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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. A-927

JOHNNY NARCISSE

Petitioner

versus

STATE OF LOUISIANA

Respondent

Petition for Writ of Certiorari To
The Supreme Court of the State of Louisiana

MICHAEL S. FAWER
Fawer, Brian, Hardy & Zatzkis
Suite 2355, Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
(504) 528-9500

Attorney for Petitioner
Johnny Narcisse

QUESTIONS PRESENTED

1. Whether the Louisiana Supreme Court misinterpreted Furman v. Georgia, 408 U.S. 238 (1972), Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976) and Jurek v. Texas, 428 U.S. 262 (1976) by resorting to a novel state-wide proportionality review of death sentences rather than a comparative review by state judicial districts.

2. Whether the Louisiana Supreme Court misconstrued this Court's recent decision in Zant v. Stephens, ___ U.S. ___, 102 S.Ct. 1856 (1982) and the requirements of the Eighth and Fourteenth Amendments in concluding that a death sentence may be sustained as long as one of a plurality of aggravating circumstances is supported by the evidence.

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Petitioner, Johnny Narcisse, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana in this case.

Citation to Opinions Below:

The opinion of the Louisiana Supreme Court is reported at 426 So.2d 118 (La. 1983), and is attached as Appendix A. The denial of rehearing by the Louisiana Supreme Court is not reported but is attached hereto as Appendix B.

Jurisdiction:

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257. The opinion of the Louisiana Supreme Court was rendered on January 10, 1983, and rehearing was denied on March 25, 1983. On May 12, 1983, Justice White entered an order extending the time for filing a petition for writ of certiorari to and including June 23, 1983.

Constitutional and Statutory Provisions Involved:

This case involves the Eighth Amendment to the Constitution of the United States which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> (N)or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the statutes in Louisiana governing sentencing in capital cases, La. Code Crim. Pro., Articles 905-905.9, including Louisiana Supreme Court Rule 28 governing review of capital sentences. These are attached as Appendix C.

Statement of the Case:

A. Course of Proceedings

The petitioner, Johnny Narcisse, was charged in Lafayette Parish, Louisiana, with the first degree murder of Elby Jolivette in violation of La. R.S. 14:30. He was convicted of first degree murder on May 29, 1981. That same day, petitioner was sentenced to death by electrocution.

The Supreme Court of Louisiana affirmed the petitioner's conviction and sentence on January 10, 1983. State v. Narcisse, 426 So.2d 118 (La. 1983). An application for rehearing was denied on March 25, 1983. An application for extension of time in which to apply to this Honorable Court for relief was granted by the Honorable Justice White on May 12, 1983, and petitioner was given until June 23, 1983, in which to file this petition.

A death warrant was signed ordering electrocution to take place on June 22, 1983. The Supreme Court of Louisiana has stayed the execution of petitioner pending the timely filing and disposition of this petition for writ of certiorari.

B. Facts Material to Questions Presented

Evidence was presented at trial that on March 17, 1979, at approximately 7:30 in the morning, Johnny Narcisse went to the house of his great aunt, Elby Jolivette. He left later that day. She was found that same afternoon, dead of multiple stab wounds.

Defendant pleaded not guilty and not guilty by reason of insanity and testified on his own behalf concerning his drug addiction and subsequent memory lapses. A qualified expert in clinical psychology testified that defendant was, at the time of an examination on February 26, 1981, functioning at a borderline level of mental retardation with neurotic depressive reaction.

Following the jury finding of guilty, the State offered evidence of aggravating circumstances. Two aggravating circumstances were offered: first, that defendant was in the perpetration or attempted perpetration of an armed robbery, and second, that the crime was committed in an especially heinous, atrocious or cruel manner. Defendant then took the stand to testify to his age of twenty-one years and to the fact that he had no criminal record. The jury found the two aggravating circumstances argued by the State to exist and recommended that the defendant be put to death. Following motions and requisite legal delays, the Judge sentenced Johnny Narcisse to death in accordanace with the recommendation of the jury.

C. How the Federal Questions Were Raised and Decided Below

1) In the Specification of Error Number 17 submitted to the Supreme Court of Louisiana by defense counsel on appeal, it was averred that the trial Court erred in concurring with the recommendation of the jury of the death sentence as the same was disproportionate in a geographic comparison to similar crimes charged and tried. Resorting to a dubious state-wide review, the Louisiana Supreme Court held said death sentence was not disproportionate.

2) This instant petition is the first opportunity the defendant has had to assert the Louisiana Supreme Court's error in affirming the death penalty of Johnny Narcisse based on a review of only one of two aggravating circumstances considered by the jury. Said issue as raised in Zant v. Stephens, ___ U.S. ___, 102 S.Ct. 1856, 72 L.Ed. 2d 222 (1982) is timely and pending before this Court. Under these particular circumstances, any further attempt at having the state court review the issue would be futile because of the Louisiana Supreme Court's undeviating position in repeatedly following the practice of reviewing only one of multiple aggravating circumstances and upholding the validity of the sentence pursuant to a finding as to the validity of just one of these circumstances. That precise question, as presented in this petition, is already before this Court in a myriad of pending certiorari petitions. See State v. Monroe, 397 So.2d 1258 (La. 1981), cert. pending; State v. Sonnier, 402 So.2d 650 (La. 1981), cert. pending; State v. Mattheson, 407 So.2d 1150 (La. 1982), cert. pending; State v. Moore, 414 So.2d 340 (La. 1982), cert. pending; State v. Sawyer, 422 So.2d 95 (La. 1982), cert. pending. Regardless, the Louisiana Supreme Court has the express obligation under state law to review all the underlying circumstances of sentencing on its own and to determine "whether the evidence supports the jury's finding of a statutory aggravating circumstance". La. Code Crim. Pro. Rule 905.9.1. Louisiana Supreme Court Rule 28.

Reasons for Granting the Writ:

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER LOUISIANA'S RECENT INCONSISTENCIES IN ITS COMPARATIVE REVIEW OF DEATH CASES VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The question here posed is related to that pending before the Court pursuant to its grant of certiorari in Pulley v. Harris, 692 F.2d 1189 (9th Cir. 1982), cert. granted, ___ U.S. ___, 103 S.Ct. 1425 (1983). In that case, the United States Court of Appeals for the Ninth Circuit remanded a death penalty sentence to the California

Supreme Court for failure to conduct a proportionality review. In its opinion, the Ninth Circuit stated that proportionality review is a requirement of Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, 428 U.S. 242 (1976). In March of 1983, this Court granted certiorari to decide what method of proportionality review is required. In the case at bar, the Louisiana Supreme Court deviated from its previous well-settled procedure by affirming a death sentence, based not upon the customary district-wide review, but rather upon a novel state-wide review. State v. Narcisse, 426 So.2d 118, 139 (La. 1983). In so doing, that state court gave no justification or explanation for this aberrant method of proportionality review which would support a finding that confirmation of the death sentence in Narcisse was not arbitrary and capricious.

In 1972, the Supreme Court of the United States mandated that application of the death penalty should not be arbitrary or capricious. Furman v. Georgia, 408 U.S. 238 (1972). In discussing the application of the death penalty, the court stated that evidence showed that it was presently applied in an inconsistent and discriminatory manner. The Court held that the use of the death penalty in Georgia and Texas was unconstitutional and suggested that "it is 'cruel and unusual' to apply the death penalty selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board". 408 U.S. at 245. At the time of this suit, Georgia and Texas had a discretionary statute which gave the sentencing authority the power to determine whether the death penalty or a lighter punishment was in order. While the statutes themselves were not found to be unconstitutional, the court held that, in their operation, they violated the Eighth Amendment. 408 U.S. at 257. All impositions of the death penalty were thus judged by this threshold standard. In keeping with this concern over the proper imposition and review of death sentences, this Court required that

"a capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not". Furman v. Georgia, supra, 408 U.S. at 313; Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

Four years later, this Court in Gregg v. Georgia, 428 U.S. 153 (1976), began its move toward more clearly defining standards for applying the death penalty. The Court stated that "the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance". 428 U.S. at 195. While it did not intend to proscribe minimum standards, the Court suggested that a bifurcated proceeding in which the sentencing authority is made aware of relevant information regarding the defendant, and is provided with standards to guide its use of information is sufficient to satisfy the requirements of Furman. In upholding Georgia's practice of review, the Court stated:

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death".
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> 428 U.S at 207.

While proportionality review is encouraged, the courts have been unwilling to set constitutional requirements for the scope of review required. Notwithstanding, this Court has never implied that a state-wide review is a constitutional requirement. Gregg v. Georgia, supra, Proffitt v. Florida, supra, Jurek v. Texas, 428 U.S. 262 (1976). However, it does appear that some method of proportionality review is so "strongly suggested" that it constitutes a minimum standard. In March of 1983,

this Court granted certiorari to decide the method of proportionality review that is required. That case is now pending. Pulley v. Harris, 692 F.2d 1189 (9th Cir. 1982), cert. granted, ___ U.S. ___, 103 S.Ct. 1425 (1983).

Louisiana's system of capital punishment is designed to prevent the arbitrary and capricious imposition of the death penalty. To safeguard against improper application of the death penalty, Louisiana enacted Article 905.9 of the Louisiana Code of Criminal Procedure which provides for automatic review of all impositions of the penalty. That article reads as follows:

> The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The Court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

In conjunction with said article, Rule 28 of the Supreme Court of Louisiana (Rule 905.9.1 of the Louisiana Code of Criminal Procedure) establishes the procedure for review of capital sentences. That statute, in pertinent part, states in Section 1(c):

> Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> . . .
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases considering both (the crime) and the defendant.

Section 4 of the rules further provides in subdivision (b) that:

> The district attorney shall file the memorandum (Sentence Review Memoranda) on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:
>
> (i) a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant. (emphasis added.)

Louisiana's consistent application of a parish-wide proportionality review has been upheld as constitutionally sufficient. Furthermore, the aforementioned rules established to govern those review procedures limit the specific requirement of comparative analysis to analogous cases within that district. Though questioned in the state's courts, see State v. Prejean, 379 So.2d 240, 250 (La. 1980) (Dennis, J., dissenting from the denial of rehearing) and State v. Williams, 392 So.2d 619, 626 (La. 1980) (Dixon, C. J., dissenting), the Louisiana Supreme Court has consistently upheld this practice. In Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), the Louisiana Supreme Court's method of parish-wide proportionality review was constitutionally questioned and upheld. The Court of Appeals concluded that parish-wide review "provides adequate safeguards against freakish impositions of capital punishment". Id. at 395. Conversely, the United States Supreme Court has never implied that state-wide review is constitutionally required. In Williams v. Maggio, the Fifth Circuit stated that:

> Just as a venire chosen from a cross section of the community in which the crime is committed is an adequate consitutional safeguard against arbitrary imposition of verdicts and sentences, so a review of the murder conviction imposed within that venire community is sufficient to insure against arbitrary imposition of the death penalty".
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> 679 F.2d at 395.

Until January of 1983, the Louisiana Supreme Court had always conducted its proportionality reviews within the district which convicted the defendant, i.e., on a parish-wide basis. In the case at bar, however, the Court engaged in a state-wide review in order to confirm the death sentence imposed. Though deviating from its established customary procedure, the Court has asserted no supportable justification for its unexpected and aberrant analysis.

Rule 28 of the Louisiana Supreme Court has been consistently applied to review death penalty cases only within the same parish. See State v. Clark, 387 So.2d

1124 (La. 1980), State v. Monroe, 397 So.2d 1258 (La. 1981), State v. Moore, 414 So.2d 340 (La. 1982), and State v. Taylor, 422 So.2d 109 (La. 1982). Interestingly enough, in the recent case of State v. Lindsey, 428 So.2d 420 (La. 1983), which was decided just two months after Narcisse, the court returned to parish-wide review with no mention of state-wide review.

The decision in Narcisse seems to suggest that consideration of cases beyond Lafayette Parish was justified because there were no other death penalty sentences imposed in that parish since 1976. While the absence of death penalty sentences in Lafayette Parish is a fact, state-wide proportionality review was not resorted to in an earlier death case arising in a similar parish with a similar dearth of death penalties. In State v. Moore, supra, the Court was presented with the exact same predicament in upholding a 1982 death sentence in Bossier Parish. In Moore, the defendant had been sentenced to death, but Bossier Parish had no cases with which to compare that case for a proportionality review under Rule 28. In that case, however, the Louisiana Supreme Court retained the parish-wide scope of proportionality review by comparing Moore to State v. Gaskin, 412 So.2d 1007 (La. 1982), also decided in Bossier Parish. In Gaskin, the defendant had committed first degree murder but, unlike Moore, the death penalty had not been imposed. The court found that, in comparison, Moore was older, more intellectually competent, and had committed a more serious crime thatn the Gaskin defendants. By contrasting and comparing Moore's death sentence to Gaskin's life sentence, the court found justification to uphold the jury's imposition of the death penalty.

Similarly, in State v. Felde, 422 So.2d 370 (La. 1982), the defendant was convicted of first degree murder in Rapides Parish and the death penalty was imposed. Although the original sentencing memorandum submitted to the Court by the District Attorney showed no other first degree murder convictions in that district (parish), the Court did not resort to a state-wide proportionality review. In fact,

the possibility of a state-wide review was never even considered. Although on rehearing, the state supplemented its original memorandum to include a death sentence case that had been erroneously omitted, the Court's original decision concluded:

> The sentence review memorandum filed by the state reflects that no death penalty has been imposed in Rapides Parish since January 1, 1976, and there have been no verdicts of first degree murder. The homicides involving a charge of first degree murder have been plea bargained to a charge of second degree murder or a lesser offense. None of the other murder cases involve the situation where a police officer has been killed. Thus, there are no similar cases, and this sentence cannot be held disproportionate to sentences in other cases.
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> 422 So.2d 370 at 397.

In State v. Sonnier, 380 So.2d 1 (La. 1979), the Supreme Court stated that "An inference of arbitrariness arises when a jury's recommendation is inconsistent with sentences imposed in similar cases from the same jurisdiction". The Lafayette Parish District Attorney's Office Sentence Review Memorandum submitted in Narcisse, showed four first degree murder prosecutions in Lafayette Parish since January 1, 1976. The death penalty was not imposed in any of those four cases. However, the court found that one of those four cases, State v. Aucoin, 362 So.2d 503 (La. 1978) showed a great similarity to Narcisse. In fact, the court states that Aucoin "was perhaps a more shocking crime". State v. Narcisse, 426 So.2d 118, 139 (La. 1983). In Aucoin, an eight-year old girl was murdered by stabbing, strangling, beating and ultimately being driven over with an automobile. As in Narcisse, the crime was committed by a relative, the victim's mother, who was a 26-year old suffering from drug addiction and mental disease. In Aucoin, a life sentence was recommended.

Confirmation of the death penalty by state-wide proportionality review appears even more arbitrary in light of State v. Lindsey, supra. Decided less than two months after Narcisse, the Louisiana Supreme Court returned to parish-wide review

in upholding the death penalty in Lindsey. After Lindsey, it is obvious that the Louisiana Supreme Court did not ostensibly "adopt" a state-wide review procedure. The aberrant application of state-wide review in Narcisse can hardly withstand a claim that it violates the mandate of Furman that imposition of the death penalty should not be conducted in an arbitrary of capricious manner.

Recently, the Louisiana Supreme Court again resorted to a state-wide proportionality review to affirm a first degree murder conviction and death sentence. In State v. Moore, 82-KA-1709, ___ So.2d ___ (La. 1983), the Louisiana Supreme Court utilized a state-wide review even though there was a prior death sentence conviction in that Parish which afforded the Court a proportionality comparison. This second application of state-wide review only serves to perpetuate the erratic pattern of unjustified inconsistency apparent in the Louisiana Supreme Court's review process.

According to the Louisiana Supreme Court's previous practice in this circumstance, parish-wide review should still be applicable. See, State v. Moore, 414 So.2d 340 (La. 1982) and State v. Felde, 422 So.2d 370 (La. 1982). Thus, any justification for employing state-wide review in Narcisse is non-existent. Less than one year ago, Louisiana fought to uphold parish-wide review and won. Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982). The United States Supreme Court has not yet ruled on this issue. The Court has determined the sufficiency of proportionality review on a case-by-case analysis. This court has mandated that proportionality review should determine "whether the sentence is disproportionate compared to those sentences imposed in similar cases, considering both the crime and the defendant". Gregg v. Georgia, 428 U.S. 153, 205 (1976). There is no evidence that parish-wide review was found by the Louisiana Court, or any court, to be constitutionally insufficient. It would seem, in light of Furman and Gregg, that the Supreme Court considers the proportionality review a safeguard against the improper imposition of

the death penalty because it protects defendants from discriminatory or arbitrary proceedings.

In light of the Louisiana Supreme Court's aberrant applicaton of proportionality review in death cases and the unresolved constitutional dimension of such review, a grant of certiorari will be particularly appropriate in this case to resolve these issues.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE LOUISIANA SUPREME COURT'S AFFIRMANCE OF A DEATH SENTENCE WHERE ONE OF THE AGGRAVATING CIRCUMSTANCES IS NOT SUPPORTED BY THE EVIDENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The question raised here is related to that pending before the Court in Zant v. Stephens, ___ U.S. ___, 102 S.Ct. 1856, 72 L.Ed. 2d 222 (1982) (certifying a question of state law to the Supreme Court of Georgia), and Barclay v. Florida, No. 81-6908, cert. granted, ___ U.S. ___, 103 S.CT. 340 (November 8, 1982). In Zant, this Court has been asked to decide "whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." Zant v. Stephens, supra, 102 S.Ct. at 1857. In the present case, the Louisiana Supreme Court, like the Georgia Supreme Court, has asserted the authority to uphold a death sentence on this basis. State v. Narcisse, 426 So.2d 118, 138 (La. 1983). Certiorari is appropriate to review the decision of the Louisiana Supreme Court because the resolution of this issue is clearly and inextricably intertwined with the question presented by Zant, and should be considered at the same time.

In Zant v. Stephens, supra, this Court explained that the state law premises were uncertain for the Georgia Supreme Court's rule that it could sustain a death sentence as long as at least one of a plurality of aggravating circumstances found by the jury is valid and supported by the evidence. Id., 102 S.Ct. 1856, 1958. The

court recognized that articulation of the reasons for this conclusion would be relevant to an analysis of the constitutionality of the state's rule and accordingly certified the question to the Supreme Court of Georgia. Id., 102 S.Ct. at 1859. Thereafter, in Zant v. Stephens, 297 S.E. 2d 1 (Ga. 1982), the Georgia Supreme Court responded to said certification and opined that where a jury separately considered and found each of two statutory grounds supporting the death penalty, the fact that one ground was subsequently declared void did not necessitate a reversal of the jury's death penalty recommendation. Whether legitimate state law premises have been presented is questionable, however, any final determination regarding its sufficiency or constitutionality will emanate from this Court.

The Louisiana Supreme Court has consistently followed the same rule as the Georgia Supreme Court rule at issue in Zant. In fact, the Louisiana Supreme Court has been less consistent in its application of appellate review rules than the Georgia Supreme Court.[1] Throughout the jurisprudence, the Louisiana State Court has provided "no more guidance as to the state law premises for that rule than the Georgia Supreme Court has provided." Williams v. Maggio, 679 F.2d 381, 405 (5th

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1. In cases where there were multiple aggravating circumstances, the Louisiana Supreme Court initially took the position that it was not necessary to review more than one valid aggravating circumstance. State v. Williams, 383 So.2d 369 (La. 1980), cert. den., 449 U.S. 1103 (1981); State v. Martin, 376 So.2d 300, 312 (La. 1979), cert. den., 449 U.S. 1119 (1980). Subsequently, in a series of three cases, the state court reviewed all the aggravating circumstances found by the jury without explaining why it was departing from its prior decisions and upheld the sentences based on determinations that all the aggravating circumstances were valid. State v. Berry, 391 So.2d 406, 416-417 (La. 1980), cert. den., 451 U.S. 1010 (1981); State v. Baldwin, 388 So.2d 664, 677 (la. 1980), cert. den., 449 U.S. 103 (1981); State v. Clark, 387 So.2d 1124, 1134-1135 (La. 1980), cert. den., 449 U.S. 1103 (1981). In the next two cases, the state court again reviewed all of the aggravating circumstances. State v. Monroe, 397 So.2d 1258 (La. 1981), cert. pending; State v. Sonnier, 402 So.2d 650 (La. 1981), cert. pending. However, even though the court determined that one of multiple aggravating circumstances was invalid, it sustained the death sentences, expressly relying on Georgia authority. State v. Monroe, supra, 397 So.2d at 276. More recently, the state court has vacillated between merely reviewing one of multiple aggravating circumstances, State v. Mattheson, 407 so.2d 1150, 1168 (La. 1982), cert. pending, and review of all the aggravating circumstances found by the jury. State v. Moore, 414 So.2d 340, 348 (La. 1982), cert. pending, State v. Sawyer, 422 So.2d 95, 101 (La. 1982), cert. pending.

Cir. 1982) (Unite A) (en banc) (Randall, J., dissenting). In Williams v. Maggio, supra, the Fifth Circuit attempted to supply a Louisiana state law premise for the rule, but without a single citation to state law authority. A petition for certiorari is now pending which seeks, inter alia, to have the Fifth Circuit certify to the Louisiana Supreme Court the question of the state law premises for its rule for appellate review of death sentences.

In State v. Sawyer, 422 So.2d 95 (La. 1982), cert. pending, the Louisiana Supreme Court attempted to clarify what state law premises, if any, existed to support its rule. Those alleged premises, however, are inconsistent with this Court's mandate that a state "tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, 446 U.S. 420, 428 (1980). First, the Court read Supreme Court Rule 28 (codified in the Louisiana code of Criminal Procedure Rule 905.9.1) as a directive that limits Supreme Court review of capital sentences to three questions: whether the sentence is disproportionate, whether the sentence was imposed under the influence of arbitrary factors, and "whether the evidence supports the jury's finding of a statutory aggravating circumstance." (Emphasis added) State v. Sawyer, supra, 422 So.2d at 101. Furthermore, the Court pointed to Louisiana Code of Criminal Procedure Article 905.3, which requires a jury finding of "at least one statutory aggravating circumstance" for the imposition of the death penalty. Id., at 101. These two provisions ultimately result in a judicially-constructed straitjacket which dictates that the court has performed its job of providing a meaningful appellate review once it has considered and affirmed one single jury finding out of a set of given findings of multiple aggravating circumstances. Id., at 102. This truncated form of appellate review, which was strictly applied in the Narcisse case, clearly does not satisfy this Court's requirement that a state must guarantee "meaningful appellate review" of "the factors (the jury) relied upon in reaching its decision" as a necessary safeguard

against the arbitrary or capricious imposition of the death penalty. Gregg v. Georgia, 428 U.S. 153, 195 (1976). The constitutional validity of this practice is closely linked to a resolution of the issue in Zant v. Stephens, supra, 102 S.Ct. at 1857.

The alleged Louisiana state law premises for the Zant rule ultimately allow jurors to base their recommendation of death on an arbitrary finding of aggravating circumstances that are not supported by evidence. The rule also precludes any determination by the state's highest court as to whether an unsupported aggravating circumstance interacted with the proper aggravating circumstances and affected the jury's decision to impose death. In the Narcisse case before this Court, the Louisiana Supreme Court argues:

> Because death was apparently quick, and because there was no additional evidence of an intention to torture, it could be argued that the crime, although vicious, brutal and treacherous, was not committed in an "especially heinous, atrocious or cruel manner." In the past, this court has divided on the "heinous" nature of stabbing and cutting offenses. See State v. Taylor, 422 So.2d 109 (la. 1982); State v. Culberth, 390 So.2d 847 (La. 1980).
>
> Here, it is unnecessary to decide whether this crime was "merely" heinous, atrocious or cruel. Because there was clear proof of one aggravating factor, even if the jury erred in finding another, the error is harmless. (Emphasis added)
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> 426 So.2d 118 at 138.

In State v. Narcisse, supra, the jury found the existence of two statutory aggravating circumstances listed in Louisiana code of Criminal Procedure Article 905.4: the offense was committed during an armed robbery and the killing was done in an especially heinous, atrocious or cruel manner. The difficulty with the Louisiana capital sentencing scheme is that there is no way to determine whether the jury relied on the unreviewed aggravating circumstance in returning a death verdict. The Louisiana statute, which is modelled after that of Georgia, State v. Martin, 376 So.2d 300, 310 (La. 1979), provides for a separate sentencing hearing after the defendant has been found guilty of a capital offense. La. Code Crim. Pro. Art.

905. During the sentencing hearing, the trial judge instructs the jury on the aggravating and mitigating circumstances under Louisiana law. The jury must be furnished with a copy of the statutory aggravating circumstances. La. Code Crim. Pro. Art. 905.3. If the jury recommends a death sentence, it must designate in writing the aggravating circumstance or circumstances found beyond a reasonable doubt. La. Code Crim. Pro. Art. 905.3 and 905.7. Even if it finds that one or more of the aggravating circumstances has been established beyond a reasonable doubt, the jury is not required to impose the death penalty. La. Code Crim. Pro. Art. 905.3; State v. Payton, 361 So.2d 866, 868-869 (La. 1978). The jury's verdict to impose the death sentence must be unanimous, La. Code Crim. Pro. Art. 905.6, but there is no statutory or judicial requirement that the jurors all vote for the death penalty because of the existence of the same aggravating circumstances. Thus, the jury's verdict does not provide any indication of what aggravating circumstances some or all of the jurors might have relied upon in reaching their decision to impose the sentence of death, or the weight that might have been accorded each of the aggravating factors in the sentencing determination.

The essence of Furman v. Georgia, 408 U.S. 238 (1972) is that the Eighth Amendment is violated whenever "there is no meaningful basis for distinguishing the few cases in which (a death sentence) . . . is imposed from the many cases in which it is not." 408 U.S. at 313 (White, concurring). Gregg v. Georgia, supra, 428 U.S. at 195 further requires that the death penalty not be imposed "capriciously or in a freakish manner." Thus, "if a state wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, supra, 446 U.S. at 428 (emphasis added). Ultimately, an attempt to determine whether an unsupported aggravating circumstance affected the jury's decision-making to impose death may indeed be held to be futile in the death penalty context based

on this Court's holding in Jackson v. Virginia, 443 U.S. 307 (1979); Sandstrom v. Montana, 442 U.S. 510 (1979); and Stromberg v. California, 283 U.S. 356 (1931). See Zant v. Stephens, supra, 102 S.Ct. 1856, 1859 (1982) (Marshall, J., dissenting). But the Louisiana rule does not even allow for this possibility, as it is based on the premise that only two forms of appellate review are appropriate, to-wit: review of a "threshold" finding of a single valid aggravating circumstance, and review of the ultimate death penalty decision for "arbitrary factors." State v. Sawyer, supra, 422 So.2d 95, 102. Nevertheless, the danger that an unsupported aggravating circumstance may have served as the sole basis for a particular juror's or a plurality of jurors' decision to impose death cannot be ignored.

In Williams v. Maggio, supra, 679 F.2d at 389, the Court of Appeals found no constitutional impropriety in the failure of the Supreme Court of Louisiana to review any additional aggravating circumstances after the "requisite one" was determined to be valid. To reach this conclusion, the Court of necessity had to speculate that the jury's decision to impose the death sentence was, as a matter of law, not influenced by two of the three factors it listed in support of the sentencing recommendation. Such speculation is clearly impossible, Id. at 401 (Randall, dissenting) and, in any event, it is impermissible under the Eighth and Fourteenth Amendments, for an appellate court is in no positon to determine whether the scale was tipped towards death because of one or both of the unreviewed circumstances. Stromberg v. California, 283 U.S. 359, 368 (1931); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 877-879 (1982) (O'Connor, concurring).

In sum, the Supreme Court of Louisiana's review procedure as evidenced in this case does not provide an adequate safeguard against the exercise of "uncontrolled discretion" by the sentencing jury. Godfrey v. Georgia, supra, 446 U.S. at 429. Certiorari should be granted to permit consideration of whether a death sentenced prisoner has been provided meaningful and constitutional appellate review when the

reviewing court considers only one of multiple aggravating circumstances relied upon by the sentencer in deciding that his life must be taken.

Conclusion:

For the reasons mentioned above, the petitioner respectfully prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted:

M. S. Fawer

MICHAEL S. FAWER
Fawer, Brian, Hardy & Zatzkis
Suite 2355, Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
(504) 528-9500

Attorney for Johnny Narcisse

ed when he tried to turn the angle iron around. Obviously had he known that the angle iron would touch the line energized with 7620 volts of electricity he would have done otherwise. The fact that the far end did indeed touch the power line does not preclude his recovery for the injuries he sustained.

As aptly stated in *Hall, supra* at 799:

> When the party charged with the responsibility of observing safety factors fails to do so, it is grossly unjust to place the blame for a resulting accident on the person who poured the last cup of water before the defective dam broke, unless that person also exercised a substantial amount of knowledgeable control over the dangerous situation. There was no such knowledge or control by plaintiff in the present case.

Therefore Hebert's actions should not have barred his recovery for injuries sustained in this work accident. The jury was clearly wrong. In so finding, we are not oblivious to the deference that should be given the determination of the district court. *Canter v. Koehring*, 283 So.2d 716 (La.1973). Nonetheless the constitutional scope of review of the Supreme Court in civil cases extends to both law and facts. La. Const. art. 5 § 5(C). In the instant case, we give less credence to the outcome in the district court because the jury charges given probably contributed to the result favorable to the defense. Those instructions did not include a significant legal principle which, as evident from this opinion, was especially relevant to the jury's proper consideration of the varying elements of responsibility between the utility company and the plaintiff workman. Plaintiff requested a specific jury instruction based upon the *Hall* case (to which reference has earlier been made in this opinion) and the standards for assessing negligence and contributory negligence in situations involving industrial safety. The judge refused, contending that the import of the requested charge was included in his general instruction. It was not.

Decree

For the foregoing reasons, the judgments of the lower courts is reversed; the case is remanded for the determination of damages.

REVERSED AND REMANDED.

DIXON, C.J., concurs.

WATSON, J., concurs in the result.

MARCUS, J., dissents and assigns reasons.

MARCUS, Justice (dissenting).

I am unable to say that the jury verdict in favor of Gulf States in this factual case was clearly wrong. Accordingly, I respectfully dissent.

STATE of Louisiana

v.

Johnny NARCISSE.

No. 81-KA-2285.

Supreme Court of Louisiana.

Jan. 10, 1983.

Concurring Opinion Jan. 25, 1983.

Defendant was convicted in the Fifteenth Judicial District Court, Parish of Lafayette, John Rixie Mouton, Senior Judge, of first-degree murder, and was sentenced to death, and he appealed. The Supreme Court, Dixon, C.J., held that: (1) the trial court did not err in allowing defendant's wife to divulge the contents of a conversation with defendant; (2) the trial court did not err in admitting defendant's confession into evidence; (3) the trial judge did not abuse his discretion in finding defendant mentally competent at the time of trial; (4) defendant was properly convicted under the

first-degree murder statute in effect at the time of the commission of the crime; (5) the trial judge properly overruled defendant's motion to suppress items taken from his home; (6) finding of the jury that the killing was committed during an armed robbery was sufficient to outweigh the mitigating factors presented by defendant; and (7) the death sentence was not disproportionate to the penalty imposed in similar stabbing cases, considering both the crime and defendant.

Affirmed.

Watson, J., concurred and filed opinion.

1. Witnesses ⇐222

Where there is a lack of evidence to the contrary, communications between spouses are presumed to be confidential. LSA-R.S. 15:461.

2. Witnesses ⇐222

In prosecution for first-degree murder, trial court did not err in concluding that statements by defendant's wife concerning conversation with defendant were not privileged where wife testified that a third person was present at time of the conversation and that defendant neither whispered nor gestured to indicate that their conversation was private, since State thus made a prima facie showing that the communications were not privileged which was not rebutted by defendant. LSA-R.S. 15:461.

3. Criminal Law ⇐684

Generally, in the trial of criminal prosecutions, state must put its whole case in evidence in its presentation-in-chief, and only rebuttal evidence should be reserved to meet the evidence adduced by defense. LSA-C.Cr.P. art. 765.

4. Criminal Law ⇐686(2)

In prosecution for first-degree murder, trial court did not err in permitting detective to testify concerning voluntariness of defendant's confession after State had rested its case where detective testified in evidentiary hearing to decide admissibility of confession during recess in the trial while jury was out of the courtroom during State's case-in-chief.

5. Criminal Law ⇐531(1)

Before a confession can be admitted into evidence, state has burden of affirmatively showing that it was made freely and voluntarily, and not influenced by fear, duress, intimidation, menaces, threats, inducements or promises; furthermore, if statement was elicited during custodial interrogation, state must show that defendant was apprised of his constitutional rights. LSA-C.Cr.P. art. 703, subd. C; LSA-R.S. 15:451.

6. Criminal Law ⇐526

Intoxication can render a confession involuntary if intoxication is of such a degree that it negates defendant's comprehension and renders him unconscious of the consequences of what he is saying; whether intoxication exists and whether it is of a degree sufficient to vitiate voluntariness of the confession are questions of fact.

7. Criminal Law ⇐736(2), 1158(4)

Admissibility of a confession is in the first instance a question for trial judge, and his conclusions as to credibility and weight of the testimony relating to voluntariness of a confession will not be overturned on appellate review unless they are not supported by the evidence. LSA-C.Cr.P. art. 703, subd. C; LSA-R.S. 15:451.

8. Criminal Law ⇐531(3)

In prosecution for first-degree murder, evidence was sufficient to sustain finding that defendant's confession was voluntary, considering description of defendant given by detectives and the 48 hours which had elapsed since defendant had injected a drug. LSA-C.Cr.P. art. 703, subd. C; LSA-R.S. 15:451.

9. Criminal Law ⇐438(5)

In prosecution for first-degree murder, trial court did not err in admitting assertedly gruesome autopsy photographs of victim at conclusion of State's argument for imposition of the death penalty.

10. Mental Health ⇐432

A defendant without capacity to understand proceedings against him or to assist

counsel in preparing a defense may not be subjected to trial. LSA-C.Cr.P. art. 641.

11. Criminal Law ⇐625

Defendant carries burden of establishing that he lacks capacity to understand the object, nature and consequences of proceedings against him, and that he is unable, in a rational and factual manner, to consult with counsel in a meaningful way, and to assist in his defense. LSA-C.Cr.P. art. 641.

12. Mental Health ⇐432

Decision as to defendant's competency to stand trial should not turn solely upon whether he suffers from a mental disease or defect, but must be made with specific reference to nature of the charge, complexity of the case and gravity of the decisions with which he is faced. LSA-C.Cr.P. arts. 641, 647.

13. Criminal Law ⇐625

In prosecution for first-degree murder, trial judge did not abuse his discretion in finding defendant mentally competent at the time of trial, and lack of a contradictory hearing to resolve issue of defendant's mental capacity to proceed was harmless. LSA-C.Cr.P. art. 647.

14. Criminal Law ⇐331

Since a defendant is presumed sane and bears burden of proving his insanity, state is not required to offer proof of sanity. LSA-R.S. 15:432.

15. Homicide ⇐179

In prosecution for first-degree murder, testimony relating to defendant's sanity at time of commission of the offense was admissible where defendant pleaded not guilty and not guilty by reason of insanity, and such testimony was not a surprise to defendant. LSA-C.Cr.P. arts. 552, 816; LSA-R.S. 15:432.

16. Criminal Law ⇐14

A defendant is to be tried under statute in effect at time of the commission of the crime; mere fact that a statute may be subsequently amended, after commission of the crime, so as to modify or lessen possible penalty to be imposed, does not extinguish liability for the offense committed under the former statute. LSA-R.S. 24:171.

17. Homicide ⇐8

Defendant was properly convicted under first-degree murder statute in effect at time of commission of the crime where subsequent amendments to first and second-degree murder statutes did not include a provision releasing or extinguishing the liability or penalty under the former statute. LSA-R.S. 14:30, 24:171; LSA-C.Cr.P. art. 905.4.

18. Criminal Law ⇐1134(8), 1178

Assignments of error neither briefed nor argued are generally considered abandoned; however, in cases where the death penalty is imposed Supreme Court reviews assignments of error not briefed as a matter of policy.

19. Jury ⇐84

Article which states that state may challenge for cause a juror who has conscientious scruples against the death penalty and who makes it "unmistakably clear • • that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him," is constitutionally valid. LSA-C.Cr.P. art. 798(2).

20. Criminal Law ⇐641.13(4)
Jury ⇐108

In prosecution for first-degree murder, trial court did not err in excluding for cause seven jurors each of whom indicated that he would not consider imposition of the death penalty under any circumstances, regardless of the facts presented at trial, and defense counsel was not incompetent for not objecting since there was no basis for an objection. LSA-C.Cr.P. art. 798(2).

21. Criminal Law ⇐665(1, 4)

Purpose of sequestration rule is to prevent witnesses from being influenced by testimony of earlier witnesses and to strengthen the role of cross-examination in developing the facts; trial judge, in his discretion, may determine disqualification of a witness when a rule of sequestration has been violated. LSA-C.Cr.P. art. 764.

22. Criminal Law ⇐641.13(4), 665(4)

In prosecution for first-degree murder, trial court did not err and defense counsel was not incompetent in permitting detective to remain in the courtroom throughout course of the trial in violation of a sequestration order, since detective could not have been influenced by prior testimony, and thus defendant was not prejudiced by presence of detective in the courtroom. LSA-C.Cr.P. art. 764.

23. Criminal Law ⇐867, 1155

Mistrial is only warranted if substantial prejudice results which would deprive defendant of a fair trial; trial court is granted discretion to determine whether a fair trial is impossible, or whether an admonition is adequate to assure a fair trial when prejudicial conduct does not fit within mandatory mistrial provisions, and the ruling will not be disturbed on review absent an abuse of discretion. LSA-C.Cr.P. art. 770; U.S.C.A. Const.Amend. 6.

24. Criminal Law ⇐867

In prosecution for first-degree murder, trial court did not err in denying a mistrial after testimony was introduced concerning items of evidence before items were contemporaneously admitted into evidence and before a chain of custody and proper foundation had been established, since items of evidence were not inflammatory, and trial judge correctly determined that an admonition to jury was sufficient.

25. Criminal Law ⇐394.6(3)

In prosecution for first-degree murder, trial judge did not err in overruling defendant's motion to suppress items taken from his home on basis that the motion to suppress was not filed in advance of trial, since allegation as ground for motion, that person who gave consent to search house in which defendant lived resided there only part of the time and therefore could not constitutionally consent to the search, did not constitute evidence of which neither defendant nor his counsel was aware. LSA-C.Cr.P. art. 703.

26. Homicide ⇐354

In prosecution for first-degree murder, finding of jury during death penalty phase that the killing was committed during an armed robbery was sufficient to outweigh mitigating factors presented by defendant. LSA-R.S. 14:30; LSA-C.Cr.P. art. 905.4.

27. Criminal Law ⇐1208(1)

In prosecution for first-degree murder, trial court did not err in sentencing defendant before it had received and reviewed the sentence investigation report, since judge had no discretion in sentencing once jury unanimously recommended death. LSA-C.Cr.P. art. 905.8.

28. Criminal Law ⇐1171.1(6)

While Supreme Court may look to article which governs argument of counsel in capital case to determine if argument was improper, in reviewing whether it is reversible error, it must determine whether argument introduced passion, prejudice or any other arbitrary factor into the proceedings which contributed to jury's recommendation of the death penalty. Sup.Ct.Rules, Rules 28, 28, § 3 (C.Cr.P.Rule 905.9.1), 8 LSA-R.S.; LSA-C.Cr.P. arts. 774, 905.2.

29. Criminal Law ⇐723(1)

In prosecution for first-degree murder, remarks made during prosecutor's closing argument to the jury at sentencing hearing did not constitute introduction of prejudice, passion, or arbitrary factors which might have tainted verdict imposing the death penalty. Sup.Ct.Rules, Rules 28, 28, § 3 (C.Cr.P.Rule 905.9.1), 8 LSA-R.S.; LSA-C.Cr.P. arts. 774, 905.2.

30. Homicide ⇐354

In prosecution for first-degree murder, evidence was sufficient to support aggravating circumstance that the offense was committed during an armed robbery, and thus death penalty imposed by jury would not be set aside. Sup.Ct.Rules, Rules 28, 28, § 3 (C.Cr.P.Rule 905.9.1), 8 LSA-R.S.

31. Criminal Law ⇐1208(1)

Inference of arbitrariness arises when a jury's recommendation of death penalty is inconsistent with sentences imposed in simi-

lar cases from the same jurisdiction. Sup. Ct.Rules, Rule 28, § 1(c) (C.Cr.P. 905.9.1), 8 LSA-R.S.

32. Criminal Law ⇐1206(2)

Death penalty recommended by jury in first-degree murder prosecution was not disproportionate to sentences imposed in similar stabbing cases when both crime and defendant were taken into consideration. Sup.Ct.Rules, Rule 28, § 1(c) (C.Cr.P. 905.9.-1), 8 LSA-R.S.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., J. Nathan Stansbury, Dist. Atty., Michael Harson, Charles Brandt and Max Jordan, Asst. Dist. Attys., for the State.

David Clarke, Lafayette, for defendant-appellant.

DIXON, Chief Justice.

Defendant Johnny Narcisse was arrested on March 18, 1979 for the March 17, 1979 murder of Elby Jolivette. He was subsequently indicted by the Lafayette Parish grand jury for first degree murder, in violation of R.S. 14:30. Two years later, on May 26 through May 29, 1981, defendant was tried and a unanimous jury returned a verdict of guilty as charged. After the sentencing phase of the bifurcated trial, the jury unanimously recommended the death penalty on a finding of two aggravating circumstances: that the offender was engaged in the perpetration or attempted perpetration of an armed robbery; and that the offense was committed in an especially heinous, atrocious or cruel manner (C.Cr.P. 905.4). The trial judge thereafter sentenced defendant to death. On appeal, defendant presents five arguments for the reversal of his conviction and sentence.

The facts involved are essentially as follows: on March 17, 1979 at approximately 6:00 p.m. Johnny Alexander discovered the body of his seventy-four year old aunt, Elby Jolivette, lying by her bathroom door. Alexander lived near his aunt and had last seen her in her backyard about 8:30 that morning. At that time Alexander had noticed a small white car parked in front of his aunt's house. When he returned from work that evening, his wife mentioned that she had not seen Mrs. Jolivette during the day. After getting no response at his aunt's house, Alexander telephoned neighbors and relatives in an attempt to locate her. When he learned that no one had heard from her that day, he walked over to her house and crawled in through the window. Mrs. Jolivette's body was sprawled on the bedroom floor. Alexander then notified police.

Alfreda Onezine testified that on March 17, 1979 she visited her mother whose house faced the Jolivette house. When she arrived at her mother's house between 8:30 and 9:00 a.m., she noticed a small white car parked in front of the victim's house. The witness identified the car as belonging to the defendant Johnny Narcisse. At the time of the crime, Ms. Onezine and the defendant's wife worked together. Daily the witness observed defendant drive his wife to work in that car. Ms. Onezine did not know when the car was moved from that spot nor did she see defendant drive the car away.

After the detectives investigating the homicide learned that defendant's vehicle had been spotted at the Jolivette residence, they picked him up at his home. The defendant accompanied the detectives to the police station, where he was advised of his rights at 2:20 a.m. on March 18, 1979. When a warrantless search of both his residence and a garbage can near his garage yielded blood stained clothing and other items which connected defendant to the crime, defendant was formally arrested at 4:55 a.m. At 6:00 p.m. on the same day, defendant confessed to the murder of his great-aunt Mrs. Jolivette. The state bolstered that account at trial by introducing defendant's knife smeared with blood of the same type as the victim's and by presenting expert testimony to the effect that defendant's shoes apparently matched a bloody print found on a rug near the victim's body.

Argument No. 1 (Assignment of Error No. 4)

By this assignment defendant contends that the trial court erred in allowing his wife to divulge the contents of a confidential conversation with defendant.

[1] The state called defendant's ex-wife, Veronica Narcisse, as a witness. The prosecutor questioned her about her relationship with the defendant and about their activities on March 16 and 17, 1979. The witness clarified that although she had been married to defendant at the time of the homicide, they were now divorced. After the prosecutor asked the witness whether defendant had made any statements to her relative to his great-aunt's death, defense counsel objected, asserting the marital privilege. The judge sustained the objection. However, further examination revealed that the statements complained of were made in the presence of a third party, defendant's mother. The witness recalled that defendant spoke in a normal tone of voice and made no indication that his mother was not to hear his statements. The judge then overruled the objection, "satisfied that this was not a private conversation." The witness proceeded to testify that at 10:00 p.m. on March 17, 1979: "He said that she had been stabbed. She was stabbed. He told me a certain amount of times, but I don't remember exactly, but he said she was stabbed. Just like that."

R.S. 15:461 provides in pertinent part that:

"The competent witness in any criminal proceeding, in court or before a person having authority to receive evidence, shall be a person of proper understanding, but:

(1) Private conversations between husband and wife shall be privileged."

Where there is a lack of evidence to the contrary, communications between spouses are presumed to be confidential. *State v. Dupuy*, 319 So.2d 294 (La.1975); *State v. Pizzolotto*, 209 La. 644, 25 So.2d 292 (1946).

In *State v. Dupuy*, supra, this court addressed a similar situation. In that case the defendant had challenged a trial court ruling allowing his wife to testify with respect to communications he contended were confidential. The wife testified that third persons were present at the time of the conversation. This court held that the trial court did not err in ruling that spousal immunity was unavailable to the defendant.

[2] In the case before us, Veronica Narcisse was questioned both in and out of the presence of the jury as to statements made by the defendant. She testified that a third person was present at the time of the conversation and that defendant neither whispered nor gestured to indicate that their conversation was private. The state thus made a prima facie showing that the communications were not privileged which was not rebutted by the defendant. The trial court did not err in concluding that the statements were not privileged within the purview of R.S. 15:461.

This assignment of error lacks merit.

Argument No. 2 (Assignments of Error Nos. 6, 7 and 11)

By these assignments defendant contends that the trial court erred in admitting his confession into evidence.

At trial, and out of the presence of the jury, the state laid the predicate for the introduction of defendant's confession. The state called Detective Dale Broussard as the sole witness to establish the voluntariness of the confession. Detective Broussard of the Lafayette Police Department testified that he took a statement from defendant between 5:30 and 6:00 p.m. on March 18, 1979. Although Detective James Credeur was present in the room during the initial questioning of the defendant, Broussard acknowledged that he was alone with the defendant when he actually typed the inculpatory statements. Defendant was observed to be very calm and alert while giving the confession. Broussard advised defendant of his Miranda rights after which the defendant signed a "waiver of rights" form. Defendant was informed of his Miranda rights a second time when he received the "voluntary statement" form. Defendant initialed that he understood the

rights printed on top of the prepared form. Broussard typed the statement that defendant gave both voluntarily and in response to questions. After the confession was completed, Broussard read over it again with defendant who initialed typographical errors and then signed the statement.

On cross-examination defense counsel questioned Broussard concerning defendant's whereabouts from the time he arrived at the police station nearly sixteen hours before he gave his statement. Broussard recalled that defendant arrived at the station at approximately 2:20 a.m., that he was informed of his Miranda rights at 2:23 a.m. and that defendant was actually arrested at 4:55 a.m. That morning defendant told Broussard that "he didn't use any drugs and . . . he drank occasionally." Broussard admitted that he did not believe the defendant did not use drugs. Following defendant's arrest, the police placed him in a holding cell and Broussard did not see defendant again until the confession was obtained.

Defendant took the stand to testify to the circumstances surrounding the confession. Defendant testified that he did "not really" recall seeing Detective Broussard before the pretrial hearings. The last thing he remembered was being at work on Friday, March 16, 1979 and "running up some preludin" in his arm. Although defendant could not remember exactly how many Preludins he had injected, he stated that it had to be ten or more since he "needed to do at least ten, fifteen . . ." In addition defendant had no recollection of ever "having gone through an interrogation" or ever "having signed any written confession."

On cross-examination the prosecutor asked defendant:

"Q. Okay, you say you can't remember giving a statement or having any questions asked of you back in March of 1979. Are you saying you were not asked any questions, or are you just saying that today at this date and time you cannot remember being asked any questions about that woman?

A. What I'm saying is I can't recall nobody asking me questions. That's what I'm saying.

Q. So, in effect you could have been asked questions but you today just don't recall that?

A. That's what I'm saying, sir."

The prosecutor tried to define the limits of defendant's lapse of memory. Defendant responded that he had always had a memory problem. When pressed with a specific instance by the prosecutor, defendant remembered getting a DWI in September of the previous year and paying a fine, but he did not recall pleading guilty to the charge.

Following defendant's testimony, the state moved to introduce the confession. The trial judge ruled that since Detective Credeur had assisted Detective Broussard in the preliminary stages of obtaining the confession, he should have been called to the stand to bolster the confession predicate. Failure to do so, the court declared, rendered the confession inadmissible.

Immediately following this ruling, the state argued that the testimony of Detective Credeur was not necessary. However, in response to the trial court's ruling, the state requested time to bring Detective Credeur from the police station to testify. Defense counsel protested that to allow the state to call this witness was equivalent to permitting the state to bring back a witness after resting to prove an essential element of the case. Nevertheless, defense counsel agreed that the calling of this witness was within the judge's discretion. The trial judge allowed the state to call Detective Credeur as an additional witness.

After a brief recess, Detective Credeur testified that he met with defendant two times on March 18, 1979—once at about 3:00 a.m. and later at about 5:00 p.m. Credeur was present when Broussard advised defendant of his Miranda rights. The prosecutor inquired whether defendant appeared to have any problem understanding, to which Credeur replied "[n]one whatsoever." Credeur described defendant as lucid, attentive and cooperative. At 3:00 a.m. defendant had divulged to Credeur that he had taken Preludins the previous afternoon and "still felt like he was having some

effects" from the drug. However, according to Credeur, defendant did not make a similar statement during the interview at 5:00 p.m. preceding the confession.

Defense counsel pursued the fact that defendant had admitted taking Preludins the preceding day. Credeur explained that the revelation occurred during a pre-test interview for a voice analyzer test. Consequently, the test was not run since the test is not administered to anyone under the influence of drugs. Credeur testified that no mention was made of the voice analyzer test when he again saw the defendant at 5:00 p.m.

When defense counsel probed Credeur about defendant's "inability" to answer questions at 3:00 a.m., Credeur corrected counsel noting that defendant "had a hesitancy to answer the questions," not "an inability to answer the questions." As time progressed the hesitancy subsided and at approximately 5:00 a.m., defendant admitted to Credeur that he had stabbed the victim. At the time of this admission Credeur felt that defendant "was coming down" from the drug. After the prosecutor assured the judge that no mention would be made of this oral inculpatory statement in the presence of the jury, the trial court ruled that the written confession was admissible.

[3] In Assignment of Error No. 6, defendant contends that the trial court erred in permitting Detective Credeur to testify concerning the voluntariness of defendant's confession after the state had rested its case. Defendant argued that Credeur's testimony was not offered in rebuttal, but rather was offered in support of voluntariness and should have been introduced in the state's case-in-chief. The trial judge had determined that Detective Broussard's testimony alone was insufficient to carry the state's burden of admissibility of the confession.

C.Cr.P. 765 provides in pertinent part: "The normal order of trial shall be as follows:

. . . . . .

(5) The presentation of the evidence of the state, and of the defendant, and of the state in rebuttal. The court in its discretion may permit the introduction of additional evidence prior to argument; . . ."

Generally, in the trial of criminal prosecutions, the state must put its whole case in evidence in its presentation in chief, and only rebuttal evidence should be reserved to meet the evidence adduced by the defense. *State v. Nix*, 327 So.2d 301 (La.1975), cert. denied, *Fulford v. Louisiana*, 425 U.S. 954, 96 S.Ct. 1732, 48 L.Ed.2d 198 (1976); *State v. Washington*, 272 So.2d 355 (La.1973). This, however, was an evidentiary hearing to decide the admissibility of the confession during a recess in the trial while the jury was out of the courtroom during the state's case-in-chief.

[4] We have never held that C.Cr.P. 765 applies to such hearings. The trial judge has great discretion in such matters. We have even approved the trial judge's permitting the state to reopen its case after resting. *State v. Rhodes*, 337 So.2d 207 (La.1976).

In Assignment of Error No. 7, the defendant challenges the trial court ruling that the confession was voluntary and therefore admissible.

[5] Before a confession can be admitted into evidence, the state has the burden of affirmatively showing that it was made freely and voluntarily, and not influenced by fear, duress, intimidation, menaces, threats, inducements or promises. C.Cr.P. 703(C); R.S. 15:451; *State v. West*, 408 So.2d 1302 (La.1982); *State v. Dewey*, 408 So.2d 1255 (La.1982); *State v. Jennings*, 367 So.2d 357 (La.1979). Furthermore, if the statement was elicited during custodial interrogation, the state must show that the defendant was advised of his constitutional rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Petterway*, 403 So.2d 1157 (La.1981); *State v. Sonnier*, 379 So.2d 1336 (La.1979).

[6] Intoxication can render a statement involuntary if the intoxication is of such a

degree that it negates defendant's comprehension and renders him "unconscious of the consequences of what he is saying." *State v. Vaccaro*, 411 So.2d 415, 425 (La. 1982); *State v. Kersey*, 406 So.2d 555 (La. 1981); *State v. Robinson*, 384 So.2d 332 (La.1980); *State v. Rankin*, 357 So.2d 803 (La.1978). Whether intoxication exists and whether it is of a degree sufficient to vitiate the voluntariness of the confession are questions of fact. *State v. Robinson*, supra.

[7] The admissibility of a confession is in the first instance a question for the trial judge, and his conclusions as to the credibility and weight of the testimony relating to the voluntariness of a confession will not be overturned on appellate review unless they are not supported by the evidence. *State v. Kersey*, supra; *State v. Robinson*, supra; *State v. Hutto*, 349 So.2d 318 (La.1977).

[8] In the present case defendant confessed to Detective Broussard during custodial interrogation. Defendant was advised of his Miranda rights at least three times on March 18, 1979 prior to the time his written statement was taken at the police station.

The testimony of the two detectives was to the effect that, even if defendant had taken at least ten Preludins on Friday afternoon, March 16, he did not appear to be intoxicated over forty-eight hours later on Sunday at the time of the written confession. Both state witnesses described defendant as calm, lucid and attentive. Each officer specifically denied that defendant was ever threatened, intimidated or promised anything by anyone to give any type of statement. Defendant did not contradict the testimony and contend that he was mistreated. Rather he claimed no recollection of any confession and attributed his lapse of memory to the drugs he had taken Friday afternoon. Considering the description of defendant given by the detectives and the time which had elapsed since the drug was injected (approximately forty-eight hours), the trial judge did not err in ruling that the confession was voluntary.

The final assignment of error included in the argument (Assignment of Error No. 11) raises these same two issues, but in the context of a denial of a new trial motion based on these same grounds. The preceding discussion of Assignments 6 and 7 disposes of this assignment as well.

These assignments of error lack merit.

Argument No. 3 (Assignment of Error No. 9)

[9] By this assignment defendant claims that the trial judge erred in admitting gruesome photographs of the victim at the conclusion of the state's argument for the imposition of the death penalty, thus diluting defendant's closing argument.

The photographs had been taken at the time of the autopsy of the victim and show the number and severity of the wounds inflicted upon her. During the guilt phase of the trial, Dr. Brierre, the forensic pathologist who performed the autopsy, described the wounds, their location and the probable manner in which each wound had been inflicted. Dr. Brierre testified from the photographs which previously had been marked for identification.

During the sentencing phase of the trial, the state recalled Dr. Brierre as its only witness. Again the physician referred to the photographs to point out the numerous stab wounds, their severity and the probable manner in which the wounds were inflicted. At the close of the doctor's testimony, the prosecutor asked that the photographs be introduced and that the jury be allowed to view them. Defense counsel requested that the pictures not be displayed to the jury until the conclusion of the sentencing hearing. The trial judge rejected this suggestion, commenting that the pictures had been offered at this point in the trial and he would permit the jury to view them now.

Defendant argues that if the state found it necessary to introduce the photographs, it would be logical to assume that the introduction would have been contemporaneous with the testimony of Dr. Brierre. Since they were not offered until the conclusion of the state's testimony, defendant surmised that the state feared that the jury would be distracted by the photographs and

would not pay proper attention to the testimony of the witness.

There is no merit to the argument. It has not been shown that the jury was in any way distracted. If there had been a distraction, defense counsel could have protected his client by objecting.

This assignment of error lacks merit.

Argument No. 4 (Assignments of Error Nos. 8b, 12 and 13)

By these assignments defendant contends that the trial court erred in denying his motion for a new trial based upon the failure of the sanity commission to abide by due process requirements, and on the "surprise" testimony at trial given by one of the members of the sanity commission.

On September 5, 1980 a sanity commission, consisting of Sidney J. Dupuy, M.D., a physician specializing in psychiatry, and Henry C. Voorhies, Jr., M.D., deputy coroner for Lafayette Parish, was appointed to determine defendant's mental capacity to proceed and his mental condition at the time of the offense. Both doctors notified the trial court that they had examined defendant pursuant to their appointments. Dr. Voorhies, in a letter dated September 22, 1980, reported that he found that defendant understood that he was charged with first degree murder, that he understood the "seriousness of said charges," and that he could "assist counsel in his defense." On February 3, 1981 Dr. Dupuy wrote to the court that he had examined defendant on January 16, 1981 and found him to be "cooperative." According to Dr. Dupuy, defendant answered questions readily, was able to give a chronological history, and exhibited no signs of any psychotic thinking. Dr. Dupuy also stated that he had interviewed defendant's mother and stepfather. They confided that defendant appeared the same since the time of the offense and "has had no behavioral changes nor any significant personality changes since the time of his aunt's death." In his opinion Dr. Dupuy felt that defendant was "able to understand the proceedings against him and able to assist counsel in his defense." He further concluded that defendant comprehended the difference between right and wrong and was able to adhere to the right.

During the guilt phase of the bifurcated trial, the state called Dr. Dupuy to testify concerning his examination of the defendant. The doctor testified that in his opinion defendant was able to understand the nature of the proceedings against him. Defendant "was aware that he was in jail and he was aware that these charges were 'wrong charges.'" Dr. Dupuy also mentioned that defendant "denied any remembrance of the incident in question." Based upon the information available and upon defendant's appearance at the time of the interview, the doctor believed that defendant was in contact with reality and was mentally competent at the time of the interview. Upon further questioning by the prosecutor, Dr. Dupuy admitted that he felt that defendant was also mentally competent on March 17, 1979.

[10] It is fundamental that a defendant without the capacity to understand the proceedings against him or to assist counsel in preparing a defense may not be subjected to trial. C.Cr.P. 641; *State v. Holmes*, 393 So.2d 670 (La.1981); *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

The various criteria which should be considered in evaluating a defendant's capacity to stand trial were articulated by this court in *State v. Bennett*, 345 So.2d 1129, 1138 (La.1977):

> "... Appropriate considerations in determining whether the accused is fully aware of the nature of the proceedings include: whether he understands the nature of the charge and can appreciate its seriousness; whether he understands what defenses are available; whether he can distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he has an awareness of his legal rights; and whether he understands the range of possible verdicts and the consequences of conviction. Facts to consider in determining an accused's ability to assist in his defense

include: whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial...."

The factors enumerated in *State v. Bennett*, supra, need not be explored in depth by the psychiatrists appointed to the sanity commission. Rather, these are guidelines to assist the courts in determining whether or not the defendant is presently capable of standing trial.

[11] The defendant carries the burden of establishing that he lacks the capacity to understand the object, nature and consequences of the proceedings against him, and that he is unable, in a rational and factual manner, to consult with counsel in a meaningful way, and to assist in his defense. *State v. Hamilton*, 373 So.2d 179 (La.1979); *State v. Weber*, 364 So.2d 952 (La.1978).

In this case, a contradictory hearing was not conducted prior to trial to resolve the issue of defendant's mental capacity to proceed, as required by C.Cr.P. 647. Rather, the trial judge, the state and the defense proceeded to trial fully aware that a contradictory hearing had not been held. It appears that defense counsel had conceded prior to trial that defendant had the mental capacity to proceed. This fact alone would not necessarily be sufficient to deprive defendant of his right to a determination of his mental capacity to proceed. See *State v. Bennett*, supra.

In addition to the findings of the court appointed sanity commission, the defendant called to the stand at trial Dr. William A. Hawkins to testify to his mental capacity. This testimony was relevant to both his present capacity to proceed and his mental state at the time of the crime.

Dr. Hawkins, a clinical psychologist, administered a battery of psychological tests to the defendant.[1] The results of the Wechsler Adult Intelligence Test showed that defendant had a verbal IQ of 76 and a performance IQ of 65. On one of the subtests, vocabulary, defendant recorded an IQ of 91, while on the arithmetic sub-test his IQ registered at 63. The variability on the various sub-tests indicated that at one time defendant functioned at a higher IQ level, but that something had happened to decrease his overall ability.

The doctor testified that he arrived at several basic conclusions about the defendant as a result of the various tests and the previous history of the defendant. Defendant had an inadequate personality and had turned to substance abuse which had affected his intellectual ability but not his neurological system at this point; defendant was experiencing neurotic depression relating to his condition; defendant had not learned to cope with his problems; and defendant's intellectual ability had decreased from low-average to borderline level. On cross-examination, Dr. Hawkins admitted that defendant would eventually function at a higher level if he used no drugs or alcohol for a period of time.

At the hearing on defendant's motion for a new trial, the trial judge ruled that defendant had waived the issue of his competency to stand trial because he had not filed a motion for a pretrial contradictory hearing and had not insisted on the hearing prior to trial. By starting trial, the defendant admitted that he was ready to start the trial and was able to assist his counsel.

Defense counsel argued that it was not incumbent upon defendant to ask for the

1. Dr. Hawkins testified that he "administered an adult intelligence test, ... gave a Bender-Gestalt test, handwriting specimen, memory for designs test, projective drawings, Rorschach test, which is a personality test, obtained somewhat of a history and did a clinical interview."

contradictory hearing once he had filed the motion for appointment of the sanity commission since defendant should be able to rely upon the law being followed. However, the trial judge responded that a defendant should not be allowed to stand back and not insist on the contradictory hearing, thereby setting up grounds for a new trial.

In making his ruling, the judge commented:

"The Court is satisfied that defendant effectively and knowingly waived the contradictory hearing required by Article 647, not only in conferences among the counsel for defendant, State, and the Court, though those conferences are not recorded in the minutes of the trial, and also by consenting to proceed to trial without objection, his having full knowledge that the reports of the doctors appointed to the Sanity Commission were to the effect that the defendant had the capacity necessary to go to trial. The Court's recollection, again though not in the record, is that defendant's capacity to stand trial was conceited (sic) by defense counsel in these conferences. Is my recollection correct . . .?"

In response to the judge's question, defense counsel replied: "That's the way I recall it, Your Honor."

Finally, the judge in denying this ground as a basis for a new trial reflected:

"This issue is for the Court, and had the Court, or this Court, been called upon to decide this issue, the Court would have held that the defendant did and does have capacity to stand trial. And that is based on the evidence on the issue heard during the trial."

[12] The letters furnished by the members of the sanity commission, along with the testimony at trial of Drs. Dupuy and Hawkins, were sufficient for the trial judge to make a determination of the defendant's mental capacity. Dr. Hawkins established that defendant was operating at a borderline level of mental retardation at the time he examined him in February, 1981. However, the decision as to defendant's competency to stand trial should not turn solely upon whether he suffers from a mental disease or defect, but must be made with specific reference to the nature of the charge, the complexity of the case and the gravity of the decisions with which he is faced. *State v. Bennett*, supra.

[13] The lack of a contradictory hearing in this case is harmless. The decision as to capacity to proceed rests with the trial judge. The judge read the letters furnished by the sanity commission prior to trial. At trial he heard testimony from one of the doctors on the commission and from another doctor furnished by the defense. In addition, it appears that the issue of a contradictory hearing had been discussed by the judge and the two attorneys prior to trial and it was conceded that defendant possessed the requisite capacity to proceed.

The commission doctors did in fact examine defendant and report their findings to the trial court before trial, even though no contradictory hearing was held. Based on these findings and the evidence on the issue of sanity adduced at trial, the trial court made a determination that defendant had the capacity to stand trial. The trial judge did not abuse his discretion in finding the defendant mentally competent at the time of trial.

Defendant also contended that the trial court erred in denying his motion for a new trial based upon the admission of the testimony of Dr. Dupuy, relating to his sanity at the time of the commission of the offense. The disputed testimony was as follows:

"Q. Now, you're saying it was your opinion from your discussions with him and the other information you may have used that you felt that he was mentally competent on March 17, 1979?

A. You could never say definitely, but it is my opinion that he was."

The defense counsel did not object to the doctors's testimony until the state had completed its questioning of the doctor. Then the defense counsel objected to the entire line of testimony reasoning that "this particular issue is something that must be raised prior to trial. The issue is insanity at

the time of the offense. What the doctor has testified is as to that, as well as sanity at present. The former issue is something that must be determined in advance of trial, however; and I request that the Judge admonish the jury with an explanation of the same." The trial judge sustained the objection as to sanity at the time of the examination as "being immaterial and irrelevant." Defense counsel then explained that his objection ran to the doctor's findings on defendant's sanity at the time of the offense. The trial court overruled the defendant's objection on this point.

[14, 15] The defendant pleaded not guilty and not guilty by reason of insanity. C.Cr.P. 552. This plea presented for the jury's consideration the accused's sanity at the time of the offense. C.Cr.P. 816; *State v. Berry*, 324 So.2d 822 (La.1975), cert. denied, *Berry v. Louisiana*, 425 U.S. 954, 96 S.Ct. 1731, 48 L.Ed.2d 198 (1976). Since a defendant is presumed sane and bears the burden of proving his insanity (R.S. 15:432), the state is not required to offer proof of sanity (*State v. Roy*, 395 So.2d 664 (La. 1981). But any testimony relating to defendant's sanity at the time of the commission of the offense was admissible and was not a "surprise" to defendant, as he argues.

These assignments of error lack merit.

Argument No. 5 (Assignment of Error No. 15)

By this assignment of error, defendant contends that the trial court erred in denying his motion to arrest judgment based upon the invalidity of the statute under which the offense was charged and also a defective verdict. Defendant set out his reasons in his written motion to arrest judgment:

> "Under the 1979 first degree murder statute, the statute under which this prosecution is based, the death penalty may be imposed where there is a killing with specific intent to do great bodily harm or to kill, and there is no requirement of any felony-murder circumstance. In contrast, at the time of trial, in 1981, the first degree murder statute required, in order to impose the death penalty, that the defendant meet certain specified criteria, felony-murder among them, all of which circumstances are aggravating and indicate a severity above and beyond the requirements of the 1979 statute. Defendant was tried under the 1979 statute, and the facts alleged to be proved and demonstrated did not involve felony-murder. Accordingly, the defendant should not be subjected to a jury recommendation of the death penalty, because to warrant the same, defendant must be held to a higher moral degree of culpability than was the case in 1979. Defendant should be given the benefit of the legislative desire and the benefit of the reduced penalty of life imprisonment."

On March 17, 1979, the date of the offense, first degree murder was defined as "the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm." R.S. 14:30 as enacted by Acts 1976, No. 657. The statute did not specify that the killing had to be committed during the course of a particular crime, such as armed robbery. In 1979 the legislature again amended the first and second degree murder statutes. First degree murder was defined to be "the killing of a human being: (1) when the offender has specific intent to kill or to inflict great bodily harm *and* is engaged in the perpetration or attempted perpetration of ... armed robbery ..." R.S. 14:30 as enacted by Acts 1979, No. 74. (Emphasis added). A murder with specific intent to kill, without any further qualification, became second degree murder with a penalty of life imprisonment and no exposure to the death penalty.

[16] It is well settled that a defendant is to be tried under the statute in effect at the time of the commission of the crime. The mere fact that a statute may be subsequently amended, after the commission of the crime, so as to modify or lessen the possible penalty to be imposed, does not extinguish liability for the offense committed under the former statute.

R.S. 24:171 provides:

"The repeal of any law shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability, civil or criminal, incurred under such law unless the repealing act expressly so provides, and such law shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

"The repeal, re-enactment, or amendment of a penal statute does not extinguish or alter the liability for penalty of the former statute, unless the legislature so intends ...." *State v. Paciera*, 290 So.2d 681, 687 (La.1974).

[17] In this case the 1979 amendments to the first and second degree murder statutes did not include a provision releasing or extinguishing the liability or penalty under the former statute. An aggravating circumstance was not an essential element of first degree murder at the time of the instant defense (see *State v. LaFleur*, 398 So.2d 1074 (La.1981), although armed robbery was one of the aggravating circumstances essential to a death sentence under C.Cr.P. 905.4. Defendant was properly convicted under the 1976 first degree murder statute in effect at the time of the commission of the crime.

This assignment lacks merit.

Assignments neither briefed nor argued

[18] Assignments of error neither briefed r or argued are generally considered abandoned. *State v. Lindsey*, 404 So.2d 466 (La.1981). However, in cases where the death penalty is imposed this court reviews assignments of error not briefed as a matter of policy. *State v. Lindsey*, supra; *State v. Monroe*, 397 So.2d 1258 (La.1981).

Assignments of Error Nos. 1 and 2

By these assignments defendant contends that (1) the trial court erred in excluding prospective jurors who voiced general objections to the death penalty and that (2) trial counsel was incompetent in not objecting to the court's exclusion of the jurors.

"In Witherspoon [*Witherspoon v. Illinois*, 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] (1968)], the United States Supreme Court held that a death sentence cannot be constitutionally carried out if the jury that recommended it was chosen by excusing members of the venire for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. Rather, imposition of the sentence would only be proper if such a juror was excused because he made it unmistakably clear (1) that he would automatically vote against the death sentence regardless of the evidence or (2) that his attitude toward the death penalty would prevent him from rendering an impartial verdict in the guilt phase of the prosecution...." *State v. Lindsey*, supra at 477.

[19] Under C.Cr.P. 798(2), the state may challenge for cause a juror who has conscientious scruples against the death penalty and who makes it "unmistakably clear ... that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him...." This article is constitutionally valid. *State v. Monroe*, supra.

[20] Each of the seven prospective jurors excused indicated that he would not consider imposition of the death penalty under any circumstances, regardless of the facts presented at trial. Some of the jurors even expressed doubts about being able to render an impartial verdict on the issue of guilt or innocence in the face of a possible death penalty for the defendant. The trial judge held the jurors to the Witherspoon standard that jurors may not be excluded merely because they voice general objections to the death penalty or express scruples against its infliction. Under the circumstances, the trial court did not err in excluding the challenged jurors and defense counsel was not incompetent for not objecting when there was no basis for an objection.

These assignments of error lack merit.

Assignment of Error No. 3

In his third assignment of error, defendant contends that the trial court erred and defense counsel was incompetent in permitting Detective Broussard to remain in the courtroom throughout the course of the trial in violation of a sequestration order.

Prior to the prosecutor's opening statement, defense counsel moved that all state witnesses be placed under the rule of sequestration. At the close of the examination of Detective Broussard, the prosecutor informed the witness that he had no further questions. The trial judge told the witness "[y]ou may step down," but did not advise the witness that he was still under the rule of sequestration. Earlier in the trial, while examining Dr. Voorhies relative to a blood sample the doctor had drawn from defendant, the prosecutor asked, "And after you drew the blood sample from Mr. Narcisse you would have given it to Detective Broussard, the man seated at the table over there?" Apparently, these two incidents form the basis for defendant's contention that Detective Broussard "remain[ed] in the courtroom throughout the course of the trial to assist the State of Louisiana."

The sequestration rule is contained in C.Cr.P. 764:

> "Upon its own motion the court may, and upon request of the state or the defendant the court shall, order that the witnesses be excluded from the courtroom or from where they can see or hear the proceedings and refrain from discussing the facts of the case or the testimony of any witness with anyone other than the district attorney or defense counsel. The court may modify its order in the interest of justice."

[21] The purpose of this article is to prevent witnesses from being influenced by the testimony of earlier witnesses and to strengthen the role of cross-examination in developing the facts. The trial judge, in his discretion, may determine the disqualification of a witness when a rule of sequestration has been violated. *State v. Stewart*, 387 So.2d 1103 (La.1980); *State v. Mullins*, 353 So.2d 243 (La.1977).

[22] Detective Broussard was one of the policemen who investigated the crime. As such, he testified to the condition of the crime scene when he arrived shortly after the body was found. Broussard was the officer who learned that defendant's car had been spotted at the victim's house the morning of the crime, and who was later given permission to search the defendant's house. Broussard also obtained the confession from defendant.

In this case the witness testified to events, some of which were the subject of prior testimony of other witnesses. Detective Broussard's testimony primarily focused on his investigation of the defendant's residence and the taking of defendant's confession. Earlier in the trial proceedings Officer Larry Mire had testified about the scene of the murder and the discovery of the victim's body. Even though Broussard might have overheard Officer Mire's testimony, Broussard should not have been swayed by this testimony since he testified to different aspects of the crime scene. Officer Mire was preoccupied with sketching the crime scene in his capacity as crime scene technician, and in taking photographs. Detective Broussard, on the other hand, briefly testified about his inspection of the victim's house. He was examined in greater detail about his search of defendant's residence, on which there was no prior testimony.

In addition, other witnesses did not testify concerning the actual taking of defendant's confession; Detective Broussard could not have been influenced by prior testimony. Detective Credeur who spoke with defendant immediately before the taking of the confession testified after Detective Broussard took the stand; Broussard could not have been influenced by his testimony.

Under these circumstances defendant was not prejudiced by the presence of Broussard in the courtroom.

This assignment of error lacks merit.

Assignments of Error Nos. 5 and 10

By these assignments defendant contends that the trial court committed error in de-

nying a mistrial, and later a new trial, by allowing the state to show inflammatory evidence to the jury before the items were contemporaneously admitted into evidence and before a chain of custody and proper foundation had been established. In Assignment of Error No. 10 defendant refers in particular to a bloody pillowcase.

Charles S. Andrews of the Louisiana State Police Crime Lab testified that he was called upon to compare shoe prints on pieces of carpeting, floor material and the pillowcase to the soles on a pair of shoes. The prosecutor showed the witness two rug remnants and a package containing two canvas type shoes. He asked the witness if these were the same ones that he had examined and further requested that the witness elaborate on the examination that had been conducted. After the witness explained the testing that was done, the prosecutor attempted to have the pillowcase marked for identification. Defense counsel objected, noting that the pillowcase had not been previously introduced into evidence and no testimony should be taken until the proper foundation had been laid. Defense counsel noted that the jury had viewed the items, specifically the bloody pillowcase, and obviously did not presume that there was "chocolate" on it. The trial judge sustained the objection, admonishing the jury "not to consider the evidence that was sought to be introduced, to be discussed."

Later, based upon this same incident, defense counsel moved for a mistrial. The trial judge denied the motion, observing that no evidence was adduced after the objection was made and that he had previously admonished the jury not to regard any of the testimony.

[23] Mistrial is a drastic remedy and, unless mandatory, is committed to the sound discretion of the trial judge.[2] C.Cr.P. 770; *State v. Tribbet*, 415 So.2d 182 (La. 1982). It is only warranted if substantial prejudice results which would deprive defendant of a fair trial. *State v. Tribbet*, supra; *State v. Sepulvado*, 367 So.2d 762 (La.1979). The trial judge is granted discretion to determine whether a fair trial is impossible, or whether an admonition is adequate to assure a fair trial when prejudicial conduct does not fit within the mandatory mistrial provisions of C.Cr.P. 770. *State v. Belgard*, 410 So.2d 720, 724 (La. 1982). The ruling will not be disturbed on review absent an abuse of discretion. *State v. Alexander*, 351 So.2d 505 (La.1977); *State v. Haynes*, 339 So.2d 328 (La.1976).

[24] Based on Mr. Andrews' testimony, the items do not appear to have been nearly so "inflammatory" as defendant contends. Mr. Andrews noted that "the marks [had] faded a lot" on one of the rugs. In regard to the other piece of rug, the witness testified: "I don't even see the marking, the shoe pattern must have faded completely off of this one. I don't even see it any more." Later, he mentioned that the patterns were "really weak now." Based on these circumstances, the trial judge correctly determined that an admonition was sufficient in this case. The harsh remedy of mistrial is not justified when an admonition will preserve the defendant's rights. *State v. Belgard*, supra; *State v. McMahon*, 391 So.2d 1120 (La.1980).

These assignments of error lack merit.

2. C.Cr.P. 770 contains the mandatory grounds for mistrial:

"Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:

(1) Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury;

(2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;

(3) The failure of the defendant to testify in his own defense; or

(4) The refusal of the judge to direct a verdict.

An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial."

Assignments of Error Nos. 8(A) and 14

[25] By these assignments defendant co. .nds that the trial judge erred in overruling his motion to suppress items taken from his home and in denying his new trial motion based upon the admission of this evidence.

When the state sought to introduce into evidence items which had been seized without a warrant from defendant's house, defense counsel objected, stating that it had come to his attention that the person granting permission to search was not a full-time resident of the house and therefore incapable of giving valid consent. The trial judge denied the tardy motion to suppress, relying upon C.Cr.P. 703 which requires that a motion to suppress evidence be filed in advance of trial unless the grounds for the motion are unknown.

The consent to search was given by Joseph Shelvin who told Detective Broussard that he resided at the house in which defendant lived.[3] Defendant argues that Mr. Shelvin resided there only part of the time and therefore could not constitutionally give consent to search the house.

Under C.Cr.P. 703, defendant must file a motion to suppress physical evidence prior to trial. In the instant case, defense counsel sought to file a belated motion, claiming that he had just learned that Mr. Shelvin resided at the house on a part time basis. C.Cr.P. 703 only allows a late filing of a motion in the case where an opportunity for a timely filing did not exist or where "... neither the defendant nor his counsel was aware of the existence of the evidence or the ground of the motion ..."

The state answered defendant's discovery motion putting defendant on notice that the state had physical evidence. The state responded that the defendant was allowed to inspect any documents or articles within its control or "in the hands of the respective agencys (sic) in whose custody said evidence is presently entrusted." Thus defendant was entitled to access to the written permission to search form signed by Joseph Shelvin at 3:55 a.m. on March 18, 1979. In addition, defendant knew who resided at his house with him. Consequently, the trial judge did not err in denying the motion to suppress or the later motion for a new trial.

These assignments of error lack merit.

Assignment of Error No. 16

[26] By this assignment defendant contends that the evidence of mitigating factors outweighed the aggravating circumstances and therefore life imprisonment is the appropriate remedy.

During the sentencing phase of the trial, the only witness called by the defense was the defendant himself. The extent of defendant's testimony was his age (twenty-three) and the fact that he had no prior criminal record.

In his closing argument to the jury defense counsel rhetorically asked the jury whether a young man would enter the house of his great-aunt and stab her with such violent force that it would result in a corpse mutilated in the manner shown in the photographs introduced by the state in the sentencing phase of the trial. Counsel then answered the question in the negative, that a young man "doesn't stab a 74-year-old woman to take food coupons and leave." Defense counsel stressed the testimony of defendant during the guilt phase of the trial relating to his drug usage. He also called the attention of the jury to the testimony of defendant's ex-wife who, although a witness for the state, nevertheless observed that it was strange that defendant worked but never brought home any money.

Defense counsel argued that the victim suffered minimal pain even though the photographs would seem to indicate otherwise. In referring again to the photographs, counsel noted that they would prove to "any reasonable man that the man who cut that woman up was not in his right mind."

Counsel reminded the jury of the testimony of defendant's mother during the guilt

3. Mr. Shelvin is married to the mother of defendant's ex-wife. Defendant and his ex-wife had resided with the family having a bedroom and bathroom assigned to them.

phase of the trial that defendant had exhibited deviant behavior since the death of his father in 1970.

In summation, the factors argued in mitigation were defendant's age, his first offender status, his drug usage, the minimal pain suffered by the victim and his history of deviant behavior.

The jury found the presence of two aggravating circumstances: the killing occurred during an armed robbery and the killing was accomplished in a particularly heinous manner.

Although defense counsel argued that the robbery only netted an old billfold and a few food coupons, the fact remains that an armed robbery took place. The jury had already rejected the defense that the defendant lacked criminal culpability because he was under the influence of drugs at the time of the offense. The photographs of the victim portray that the victim was in the words of defense counsel "carv[ed] . . . up like hamburger meat."

The finding of the jury that the killing was committed during an armed robbery was sufficient to outweigh the mitigating factors presented by the defendant.

This assignment of error lacks merit.

Assignment of Error No. 17

By this assignment defendant contends that the trial court erred in concurring with the recommendation of the jury in the death sentence since the sentence is disproportionate when compared to penalties imposed in similar cases tried in the region.

This assignment will be discussed in the sentence review section of this opinion.

Assignment of Error No. 18

[27] By this assignment defendant contends that the trial court erred in sentencing him before it had received and reviewed the sentence investigation report.

The jury in the instant case unanimously recommended that defendant be sentenced to death. According to C.Cr.P. 905.8, "[t]he court *shall* sentence the defendant in accordance with the recommendation of the jury." (Emphasis added). The judge has no discretion in sentencing once the jury unanimously recommends death. Accordingly, the judge did not err in imposing the sentence before he had received the report.

This assignment of error lacks merit.

SENTENCE REVIEW

At the conclusion of the sentencing hearing, the jury returned a unanimous recommendation that the defendant be sentenced to death. On June 22, 1981 defendant was sentenced to death.

Article 905.9 of the Code of Criminal Procedure mandates that every sentence of death be reviewed to determine if it is excessive, and that this court "by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review." Supreme Court Rule 28 (which appears as C.Cr.P. 905.9.1) provides:

> "Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In compliance with Supreme Court Rule 28, § 3, the trial judge submitted a Uniform Capital Sentence Report. The report indicates that defendant is a twenty-three year old divorced black male with one child whom he does not support. Defendant, a poor student, left high school at the end of the tenth grade.

Defendant's parents were married, but defendant lived with his grandparents from age two months until his marriage at age twenty-one. According to his mother, defendant was close to his father and began having serious emotional problems after his father's death in 1970. Defendant became

a drug user at an early age, approximately twelve years old.

Defendant suffers vision loss from iritis, a serious inflammation of the eye. His loss of vision was apparently a contributing factor to his erratic work history. The defendant's mother explained that it was very difficult for her son to hold a job because of problems with his eyes.

The victim was defendant's seventy-four year old great-aunt who had been friendly with him. Her nieces described the victim as "a very lovable woman who intensely cared for the offender."

Psychological testing revealed that defendant had an inadequate personality and was functioning at a borderline level of mental retardation. The tests indicated that defendant's IQ had been substantially greater at some period in the past. The reduced IQ was attributed to the defendant's heavy drug usage.

At trial there was psychiatric testimony that defendant knew the difference between right and wrong and was able to adhere to the right.

Although he confessed to the murder on March 18, 1979, at trial defendant testified that he had no recollection of the events of the day of the murder. This same memory lapse was related to the officer preparing the Sentence Investigation Report.

PASSION, PREJUDICE AND ARBITRARY FACTORS

The defendant contends that the death sentence was imposed under the influence of passion, prejudice or other arbitrary factors attributable to improper and inflammatory remarks made during the prosecutor's closing argument to the jury at the sentencing hearing.

Argument of counsel is governed by C.Cr.P. 774, which provides:

"The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case.

The argument shall not appeal to prejudice.

The state's rebuttal shall be confined to answering the argument of the defendant."

This court has defined the scope of such argument:

"... The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict...." *State v. Hayes*, 364 So.2d 923, 926 (La.1978).

C.Cr.P. 774 is applicable to capital sentencing procedure by virtue of C.Cr.P. 905.2 which adopts, insofar as they are applicable, the general provisions of the Code of Criminal Procedure as the procedure to be followed during the sentencing phase of the bifurcated trial. *State v. Lindsey*, supra.

[28] While this court may look to art. 774 to determine if argument was improper, in reviewing whether it is reversible error, it must determine whether the argument introduced passion, prejudice or any other arbitrary factor into the proceedings which contributed to the jury's recommendation of the death penalty. *State v. Lindsey*, supra.

[29] In the present case the prosecutor asked the jury that they "in all essence really just disregard all this evidence about the drug addict business. There's nothing; that's not a mitigating factor."

Earlier in the argument the prosecutor reminded the jury that:

"... Every day we always read in the paper about someone else being shot, someone else being killed, the crime rate, people clammering (sic) about what is going to be done about the crime rate, what's going to be done about this. If people write in, and they always say, well, we need to get stiffer with the criminals. The courts are letting them off with nothing. They get out on probation. They get out on parole. We're afraid. We're baby coddling. Well, you

as jurors have the chance now to stand up and say we're not going to do that. It is a tough decision but it's got to start somewhere. As the old saying goes, the buck stops here and in this case it stops in this jury box. If you can't after looking at all the facts, after considering all of the evidence, after considering those photographs, after considering everything that has gone on in this courtroom in the last three days, if you can't justify the death penalty in this case, then do we have any room to complain about our crime situation?"

Later, the prosecutor stressed the deterrence function of the death penalty:

"... The State asks for the death penalty because we feel that this is one of those cases that warrants it. In addition, we feel that it is time that this community and the people in it tell the ones who are going around committing crimes that we're not going to play with this any more. From now on we're going to deal with it harshly, as harshly as you deal with your victims. That is what we're going for. As a warning or as a statement to the criminal element in our society that you'll no longer be received with kid gloves and red carpet treatment when you come to the courthouse. If it deters the killing of one human being then it has served a purpose. Society will have received the goal it is seeking, to try to eliminate or eradicate crime. We may never do it but if we don't start somewhere, then where do we start? We can always push it to the back and try to put the blame on someone else, the court system, the lawyers, technicalities, stuff like that. But as I said before the buck stops here. You can no longer blame it on technicalities. You can no longer blame it on the court system because the court system at this point is you and you have to make the decision."

At no time did defense counsel lodge an objection to the content of this closing argument. Ordinarily, this court would find that the issue had not been preserved for review. C.Cr.P. 841. However, since this is a capital case, the obligation to examine the record for passion, prejudice or arbitrary factors which might have contributed to the death penalty recommendation requires a review of the prosecutor's argument for possible reversible error. *State v. Lindsey*, supra.

In brief, defendant now argues that the cumulative effect of the prosecutor's argument infected the penalty verdict with arbitrariness, prejudice and passion. The argument is well made, but is without real substance. An intelligent jury could not reasonably have believed that the prosecutor was urging them to ignore the law and base their decision simply on their emotional response to the crime. *State v. Monroe*, supra.

The prosecutor argued that: drug addiction should not be considered a mitigating factor in this crime; the death penalty was justified because of its deterrent effect; the responsibility of the jury was serious; and that this particular crime justified the imposition of the death penalty. The argument did not appeal to prejudice. There was no appeal to passion. There was no introduction of arbitrary factors which might have tainted the verdict.

AGGRAVATING CIRCUMSTANCES

[30] The jury found the existence of two aggravating circumstances: the offense was committed during an armed robbery and the killing was done in an especially heinous, atrocious or cruel manner.

The evidence fully supports the finding that defendant stabbed his great-aunt during the course of an armed robbery. In his confession defendant admitted taking the victim's wallet from her purse. The wallet was discovered in a brown paper bag in a garbage can at defendant's home. The bag also contained the knife identified as the murder weapon, thus leading to the conclusion that the wallet was stolen at the time of the murder.

The coroner testified that the victim had been stabbed sixteen times, mostly in the head and neck area. Several of these wounds were of sufficient severity to have

independently caused the victim's death. There were deep lacerations on the left side of the face, neck, shoulder and scalp. The doctor pointed to wounds where tissue had been lost because the knife was removed at a different angle than the one at which it entered the body. The coroner noted particularly that wounds to the heart and the one severing the aorta were inflicted at a time when the victim had already lost a great amount of blood. This conclusion was reached because there was minimal bleeding from these punctures which would ordinarily be expected to bleed profusely. He suggested that these later lacerations may have been inflicted to halt the victim's groaning. The coroner estimated that the victim might have lived for about five minutes after the first blow was inflicted, but was probably unconscious about a minute after the attack. In addition to the lacerations, the victim was bruised and swollen, which indicated that a struggle had taken place. There were also multiple blunt indentations on the face of the victim which represented blows "from either the opposite, the non-cutting portion of the blade or fingernails possibly."

In the instant case, many of the cuts and lacerations were described as potentially fatal. The victim suffered a broken hip when she fell from the force of the attack. Defendant administered the final wounds with such force that the victim's ribs were broken. The attack apparently came without warning, by a young and trusted kinsman the victim had befriended, whose object was his aged great-aunt's money.

Because death was apparently quick, and because there was no additional evidence of an intention to torture, it could be argued that the crime, although vicious, brutal and treacherous, was not committed in an "especially heinous, atrocious or cruel manner." In the past, this court has divided on the "heinous" nature of stabbing and cutting offenses. See *State v. Taylor*, 422 So.2d 109 (La.1982); *State v. Culberth*, 390 So.2d 847 (La.1980).

Here, it is unnecessary to decide whether this crime was "merely" heinous, atrocious or cruel, or whether it was "especially" heinous, atrocious or cruel. Because there was clear proof of one aggravating factor, even if the jury erred in finding another, the error is harmless.

It is unnecessary for both aggravating factors found by the jury to be present. *State v. Moore*, 414 So.2d 340 (La.1982); *State v. Monroe*, supra.

> "Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon...." *State v. Monroe*, supra at 1276.

Since the evidence was sufficient to support one of the aggravating circumstances, the sentence imposed by the jury will not be set aside.

PROPORTIONALITY OF SENTENCE

[31] The purpose of the proportionality inquiry is to determine "whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Supreme Court Rule 28, § 1(c); *State v. Monroe*, supra. An inference of arbitrariness arises when a jury's recommendation is inconsistent with sentences imposed in similar cases from the same jurisdiction. *State v. Sonnier*, 380 So.2d 1 (La.1979).

[32] The Sentence Review Memorandum submitted to this court by the Lafayette Parish District Attorney's Office shows that there have been four prosecutions for first degree murder in Lafayette Parish since January 1, 1976. Only in the present case did the jury recommend the death penalty.

State v. Aucoin, 362 So.2d 503 (La.1978), involved the murder of an eight year old girl by her mother. The crime was committed by stabbing, strangling, beating and ultimately driving over the victim with an automobile. The state argued that the crime was committed in an especially heinous manner, while the defendant claimed

mental disease and drug addiction. The defendant was twenty-six with no prior criminal record. The defendant had been released from Central Louisiana State Hospital less than a year before the crime, having been diagnosed as suffering from depression neurosis and drug dependence. The jury recommended life imprisonment.

In *State v. Thibeaux*, 366 So.2d 1314 (La. 1978), after convicting the defendant of first degree murder, the jury returned a recommendation of life imprisonment. This court reversed the conviction of the defendant for the murder of her husband because the trial court improperly restricted testimony regarding the violent acts of the victim against the defendant. Defendant was a thirty-nine year old black female with four children. During the trial, the state offered no evidence of aggravating circumstances.

In *State v. Francis*, 403 So.2d 680 (La. 1981), this court affirmed the convictions of the defendant for two counts of first degree murder based upon an altercation in a lounge. The defendant noticed his former girl friend dancing with another man and shot him. The security guard located on the premises tried to calm the disturbance and pulled his gun, firing at the defendant. Defendant then shot and killed the security guard. The state argued that the defendant knowingly created a risk of death or great bodily harm to more than one person. Defendant received a sentence of life imprisonment for the crimes.

This is the first sentence of death rendered by a Lafayette jury in the fifty years prior to this prosecution. Of the three cases occurring within the time period embraced by the court rule, *State v. Aucoin*, supra, was perhaps a more shocking crime; *State v. Francis*, supra, involved the shooting of two men; in *State v. Thibeaux*, supra, there was a strong claim of self-defense.

If the review of proportionality is limited to cases in Lafayette Parish, the sentence in this case can only be compared with the sentence in the Aucoin case (life imprisonment), because the known facts in the two cases show a great similarity. A review of cases from other parishes, however, will justify the death sentence.

In *State v. Clark*, 387 So.2d 1124 (La. 1980), the victim was stabbed thirty to thirty-five times in the back, neck, head, arms and hands. An East Baton Rouge Parish jury sentenced the defendant to death, finding that he was engaged in the perpetration or attempted perpetration of an armed robbery and also that the offense was committed in an especially heinous, atrocious or cruel manner.

In *State v. Monroe*, 397 So.2d 1258 (La. 1981), the defendant broke into the victim's home in Orleans Parish and stabbed her seven times. This court affirmed his conviction and death sentence.

In *State v. Moore*, 414 So.2d 340 (La. 1982), the victim suffered thirteen stab wounds, seven of them potentially fatal. This court upheld the Bossier Parish jury's sentence of death. *But see, State v. Gaskin*, 412 So.2d 1007 (La.1982).

In *State v. Taylor*, 422 So.2d 109 (La. 1982), a Jefferson Parish jury unanimously recommended the death penalty, finding two aggravating circumstances. In that case, the victim was stabbed over twenty times, and was found stuffed in the trunk of his car. *But see State v. Sharp*, 418 So.2d 1344 (La.1982).

Considering both the crime and the defendant in the instant case, the death sentence is not disproportionate to sentences imposed in similar stabbing cases. Proportionality review is a safeguard against excessive sentences imposed because of arbitrary action by a jury. The jury in the instant case did not act arbitrarily in comparison with other juries in similar cases in recommending the death penalty.

DECREE

The conviction and sentence are affirmed.

WATSON, J., concurs and assigns reasons.

WATSON, Justice, concurring.

I concur in the affirmation of the conviction and sentence in this case. However, I disagree with the majority that there is "great similarity" between this case and *State v. Aucoin*, 362 So.2d 503 (La., 1978) and the subsequent consideration of cases from other jurisdictions as to proportionality.

The *Aucoin* case involved the murder of a young girl by her mother. The relationship of the parties alone is sufficient to distinguish *Aucoin* from *Narcisse*, where the youthful defendant murdered his seventy-four year old great-aunt. There are no other death sentence cases reported from Lafayette Parish and as a consequence there can be no realistic review as to proportionality. Nevertheless, the sentence is in keeping with the circumstances of the crime and should be affirmed.

For these reasons, I respectfully concur.

STATE of Louisiana

v.

Delbert James MANUEL.

No. 82-K-1364.

Supreme Court of Louisiana.

Jan. 10, 1983.

A proceeding was instituted to forfeit two vehicles seized by the State as contraband. The Fourteenth Judicial District Court, Parish of Calcasieu, Arthur J. Planchard, J., denied defendant's motion for release of vehicles, and defendant's application for a review of the ruling was granted. The Supreme Court, Dennis, J., held that: (1) the forfeiture statute was not unconstitutional on its face nor in its application to two vehicles which were used in the production, manufacture or distribution of controlled dangerous substances and, hence, were contraband articles, and (2) forfeitures were warranted under evidence indicating that the defendant used the vehicles to transport illicit drugs to a rendezvous point where he engaged in unlawful distribution of them in violation of the controlled dangerous substances law.

Affirmed and remanded.

Marcus and Watson, JJ., concurred.

1. Forfeitures ⇐1

A forfeiture proceeding is quasi-criminal in character with its object, like a criminal proceeding, being to penalize for the commission of an offense against the law; the forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the prosecution. LSA-R.S. 32:1550.

2. Forfeitures ⇐5

Trial court hearing motion for release of vehicles on ground that forfeiture proceedings were based on invalid statute properly expanded proceedings to include question of whether there was probable cause to forfeit vehicles under statute if it were declared to be constitutional. LSA-R.S. 32:1550; LSA-Const. Art. 1, § 2; LSA-C.Cr.P. arts. 3, 291 et seq., 532(1).

3. Criminal Law ⇐633(1)

Where no procedure is specifically prescribed by statute, the court may proceed in a manner consistent with the spirit of the provisions of the constitution and the law. LSA-Const. Art. 1, § 2; LSA-C.Cr.P. arts. 3, 291 et seq., 532(1).

4. Forfeitures ⇐3

Personal effects may not be taken through forfeiture unless they are classified as contraband and then only by due process of law. LSA-R.S. 32:1550; LSA-Const. Art. 1, §§ 4, 5, 19, 22.

5. Forfeitures ⇐1

A person's ownership rights may not be diminished through forfeiture except by reasonable statutory restrictions and rea-

Supreme Court of Louisiana

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE # 35

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 25th day of March, 1983, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARING GRANTED:

82-C-0306	Lafayette Parish School Board v. Market Leasing Co., Inc.

REHEARINGS DENIED:

81-B-1327	Louisiana State Bar Association v. C. Edward Karst (Two Applications)
81-KA-2285	State v. Johnny Narcisse
81-KA-2442	State v. David D. Lewis DIXON, C.J., CALOGERO & DENNIS, J.J., would grant a rehearing.
81-B-2526	Louisiana State Bar Association v. Jerry B. Daye
81-KA-3117	State v. Chapman Dodge Center, Inc., & John Swindle WATSON, J. would grant a rehearing. LEMMON, J., would grant as to both defendants.
82-B-0294	Louisiana State Bar Association v. Ralph E. Orpys
82-KA-0730 C/W 82-KA-1514	State v. Darryl Clayton, et al
82-KA-1323	State v. Tyronne Lindsey DIXON, C.J., would grant a rehearing.
82-C-1428	Ezra Chapman v. Belden Corporation (Two Applications)
82-C-1437	Andrea Entrevia v. A. E. Hood, Jr.
82-KA-1517	State v. Bobby L. Woods BLANCHE & LEMMON, J.J., would grant a rehearing.
82-C-1695	Industrial Sand and Abrasive, Inc. v. Louisville and Nashville Railroad Co., et al DIXON, C.J., CALOGERO & DENNIS, J.J., would grant a rehearing.
82-KA-1704	State v. Bennie J. Brewer WATSON, J., would grant a rehearing. LEMMON, J., dissents with reasons.
82-C-1713 C/W 82-C-2346	Anna Margaret Bodden, wife of Richard Arsenaux vs. Richard Arsenaux MARCUS, BLANCHE & LEMMON, J.J., would grant a rehearing.
82-C-1797	Kel-Ken Ivestment Corp., et al v. Village of Greenwood, et a
82-C-1827	Ms. Minnie Fisher, Widow of Allen Charles Fisher, Jr., etc., et al v. Forest Walters, et al BLANCHE, J., would grant a rehearing.

include habitual offender provisions. Similarly, the Louisiana habitual offender law is not included in this Code and is retained in Title 15 of the Revised Statutes. [LSA–R.S. 15:529.1].

C. EXECUTION OF SENTENCE

Materials in Title 15 of the Revised Statutes that relate to the execution of sentence contain much administrative detail and therefore are omitted from this Code and retained in Title 15 of the Revised Statutes. [Same citations].

The provisions relating to execution of sentence retained in Title 15 are:

§ 565 Duty of sheriff as to execution of sentence

§ 566 Delivery of convict to penitentiary

§ 566.2 Commencing of sentence to state penitentiary

§§ 567 to 571 Execution of death sentence (very detailed administrative procedures)

D. PRISON ADMINISTRATION

The following rules relating to prison administration are also retained, without change, in Title 15 of the Revised Statutes.

§§ 571.3 to 571.10 Diminution and commutation of sentence

§§ 571.11 to 571.12 Disposition of fines and forfeitures

§§ 572 to 574.1 Reprieve and pardon

§§ 574.2 to 574.16 Parole

§§ 575 to 581.22 Reporting, tabulation and publication of criminal statistics

§§ 701 to 1082 Prisons and correctional institutions

CHAPTER 3. SENTENCING IN CAPITAL CASES

Art.

Art. 905. Capital cases; sentencing hearing required

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Added by Acts 1976, No. 694, § 1.

Art. 905.1. Sentencing hearing jury; commencement

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

Added by Acts 1976, No. 694, § 1. Amended by Acts 1977, No. 105, § 1.

Art. 905.2. Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Added by Acts 1976, No. 694, § 1.

Art. 905.3. Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Added by Acts 1976, No. 694, § 1.

Art. 905.4. Aggravating circumstances

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated

burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Added by Acts 1976, No. 694, § 1. Amended by Acts 1979, No. 74, § 2, eff. June 29, 1979.

Art. 905.5. Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Added by Acts 1976, No. 694, § 1.

Art. 905.6. Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Art. 905.7. Form of recommendations

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/ _____
Foreman"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ _____
Foreman"

Added by Acts 1976, No. 694, § 1.

Art. 905.8. Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously

agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Art. 905.9. Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Added by Acts 1976, No. 694, § 1.

Supreme Court Rule 28

Rule 905.9.1. Capital sentence review (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital

sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case,

iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, eff. Jan. 1, 1978.

For Annotative Materials, see West's Louisiana Statutes Annotated

DATE: June 23, 1983

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this date served a copy of the foregoing Petition upon the State of Louisiana by depositing a copy of the same in the United States Mail, first class and postage prepaid, to the Honorable J. Nathan Stansbury, District Attorney, Parish of Lafayette, P. O. Box 3306, Lafayette, Louisiana, 70502, and to the Honorable William J. Guste, Attorney General of the State of Louisiana, 234 Loyola Avenue, Seventh Floor, New Orleans, Louisiana, 70112. All parties required to be served have been served.

M. S. Fawer

MICHAEL S. FAWER

826982

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO: A-927

JOHNNY NARCISSE,
Petitioner

versus

STATE OF LOUISIANA,
Respondent

NOTARIZED STATEMENT OF MAILING

Michael S. Fawer, being duly sworn, states:

1. I am counsel for the petitioner in the above-captioned proceeding and am admitted and qualified before the Supreme Court of the United States.
2. In compliance with Rule 28.2, I am filing this notarized Statement of Mailing.
3. On June 23rd, 1983, I personally deposited an envelope in the United States Post Office located in the City of New Orleans, State of Louisiana, first class postage prepaid, and properly addressed to the Clerk of this court, containing the enclosed Petition for Writ of Certiorari To The Supreme Court of the State of Louisiana and adjoining documents, Motion For Leave to Proceed In Forma Pauperis and an Affidavit In Support of Motion To Proceed in Forma Pauperis.

4. The documents specified in paragraph 3 were all deposited in the United States Post Office and were postmarked on June 23rd, 1983, within the time allowed for filing and in the manner specified in Paragraph 3.

M. S. Fawer

MICHAEL S. FAWER

SWORN TO AND
SUBSCRIBED BEFORE ME
THIS 24 DAY OF JUNE, 1983.

NOTARY PUBLIC

8 2 6982

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO: A-927

JOHNNY NARCISSE,
Petitioner

versus

STATE OF LOUISIANA,
Respondent

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The petitioner, Johnny Narcisse, who is now held in the Louisiana State Penitentiary at Angola, Louisiana asks leave to file the attached petition for a Writ of Certiorari to the Supreme Court for the State of Louisiana without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

On or about May 1, 1983, counsel assumed the responsibility to represent the petitioner, without a fee, for the purpose of preparing and presenting the attached petition. Petitioner was represented by appointed counsel at both the state District Court and Supreme Court levels.

The petitioner's affidavit in support of this motion is attached hereto.

FAWER, BRIAN, HARDY, & ZATZKIS
PAN AMERICAN LIFE CENTER
SUITE 2355
601 POYDRAS STREET
NEW ORLEANS, LOUISIANA 70130
TELEPHONE (504) 528-9500

BY: M. S. Fawer
MICHAEL S. FAWER

ATTORNEY FOR
JOHNNY NARCISSE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO. A-927

JOHNNY NARCISSE
Petitioner

VS.

STATE OF LOUISIANA
Respondent

Affidavit in Support of Motion
To Proceed in Forma Pauperis

I, Johnny Narcisse being first duly sworn according to the law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: (1) I am the petitioner in the above entitled case; (2) because of my poverty I am unable to pay the costs of said case; (3) I am unable to give security for the same; (4) I believe that I am entitled to the redress I seek in said case.

I was sentenced to a State penitentiary by a District Court for the Parish of Lafayette, Louisiana on a charge of first degree murder. I am still serving my sentence and therefore have no current employment, nor have I received income in the past year. I have no savings or checking accounts and no longer own any valuable property. No persons are dependent on me for support.

I understand that a false statement on this affidavit will subject me to penalties of perjury.

JOHNNY NARCISSE

SWORN TO AND SUBSCRIBED before me this 20th day of June, 1983 at Angola, Louisiana.

NOTARY PUBLIC

8 2698 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO: A-927

JOHNNY NARCISSE,
Petitioner

versus

STATE OF LOUISIANA,
Respondent

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The petitioner, Johnny Narcisse, who is now held in the Louisiana State Penitentiary at Angola, Louisiana asks leave to file the attached petition for a Writ of Certiorari to the Supreme Court for the State of Louisiana without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

On or about May 1, 1983, counsel assumed the responsibility to represent the petitioner, without a fee, for the purpose of preparing and presenting the attached petition. Petitioner was represented by appointed counsel at both the state District Court and Supreme Court levels.

The petitioner's affidavit in support of this motion is attached hereto.

FAWER, BRIAN, HARDY, & ZATZKIS
PAN AMERICAN LIFE CENTER
SUITE 2355
601 POYDRAS STREET
NEW ORLEANS, LOUISIANA 70130
TELEPHONE (504) 528-9500

BY: M. S. Fawer
MICHAEL S. FAWER

ATTORNEY FOR
JOHNNY NARCISSE

IN THE
SUPREME COURT OF THE UNITED STATES
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JOHNNY NARCISSE
Petitioner

VS.

STATE OF LOUISIANA
Respondent

Affidavit in Support of Motion
To Proceed in Forma Pauperis

I, Johnny Narcisse being first duly sworn according to the law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: (1) I am the petitioner in the above entitled case; (2) because of my poverty I am unable to pay the costs of said case; (3) I am unable to give security for the same; (4) I believe that I am entitled to the redress I seek in said case.

I was sentenced to a State penitentiary by a District Court for the Parish of Lafayette, Louisiana on a charge of first degree murder. I am still serving my sentence and therefore have no current employment, nor have I received income in the past year. I have no savings or checking accounts and no longer own any valuable property. No persons are dependent on me for support.

I understand that a false statement on this affidavit will subject me to penalties of perjury.

Johnny Narcisse
JOHNNY NARCISSE

SWORN TO AND SUBSCRIBED before me this 20th day of June, 1983 at Angola, Louisiana.

Clovis Fillery
NOTARY PUBLIC

82-6982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. A-927

JOHNNY NARCISSE,
Petitioner

VERSUS

STATE OF LOUISIANA,
Respondent

ORIGINAL BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

J. NATHAN STANSBURY
DISTRICT ATTORNEY

BY: MICHAEL HARSON
ASSISTANT DISTRICT ATTORNEY
P. O. Box 3306
Lafayette, Louisiana 70502
(318) 232-5170

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NOTARIZED STATEMENT OF MAILING

J. Nathan Stansbury, being duly sworn, states:

1. I am District Attorney for the Fifteenth Judicial District of Louisiana, and am counsel for the State of Louisiana in the above captioned proceeding and am admitted and qualified before the Supreme Court of the United States.

2. In compliance with Rule 28.2, I am filing this notarized Statement of Mailing.

3. On August 25, 1983, I personally deposited an envelope in the United States Post Office located in the City of Lafayette, Louisiana, first class postage prepaid, and properly addressed to the Clerk of this Court containing the enclosed Brief in Opposition to Writ of Certiorari to The Supreme Court .

J. Nathan Stansbury
J. NATHAN STANSBURY

SWORN TO AND SUBSCRIBED before me, the undersigned notary, on the 25th day of August, 1983, at Lafayette, Louisiana.

Joan L. Slaughter

NOTARY PUBLIC

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QUESTIONS PRESENTED

1. Does the fact that the Louisiana State Supreme Court considerered a statewide proportionality review inadequate to provide the defendant requisite due process under the United States Constitution.
2. Is the State Supreme Court Constitutionally required to review each and every aggravating factor found by the jury in support of the death penalty regardless of the fact that only one is required to support the imposition of the death penalty?

STATEMENT OF THE CASE

For brevity's sake, the State will accept the statement of facts previously given in the Writ of Certiorari prepared by Petitioner since same appears to be an accurate statement of same.

ARGUMENT

ARGUMENT ON ISSUE NO. 1:

The first issue argued by the petitioner is that the Louisiana State Supreme Court has arbitrarily and sporadically deviated between a district or parish wide review of proportionality in sentence and a statewide proportionality review in determining the validity of a death sentence imposed.

Although petitioner goes to great length trying to point out the instances in which the State Supreme Court has used a statewide review and those in which it has limited itself to a district-wide review, petitioner really fails to submit any legitimate reason as to why a state-wide review provides the defendant or petitioner with any less protection under the Constitution.

As pointed out by the petitioner, no cases of this Court have ever conclusively stated that only a district-wide comparison was constitutionally proper, but only cites cases standing for the proposition that a district-wide comparison is consistent with Constitutional safeguards.

Inasmuch as this issue has never been finally decided by this Court, certainly there is not a wealth of jurisprudence or guidance provided into arguing this point. It appears to this writer that it basically narrows to a common sense approach and this writer will attempt to approach it from that viewpoint.

Every person in the State of Louisiana is governed by the same laws as any other citizen of this State. Each such person faces the same penalties for his violent acts as well as enjoying all the same rights as any other citizen. It is incongruous to this writer that a particular law should be subject to being limited by the moral considerations, idiosyncrasy or cultural backdrop of any one particular district.

It is not difficult to take the petitioner's argument and draw it out to its logical conclusion that being in a district where no death penalty has ever been previously imposed, that therefore no death penalty could be imposed because you would never have a case, regardless of how similar, where the death penalty was imposed. Certainly, in such a comparison, if you had a prior case which was quite similar factually to the one at issue and the death penalty was not imposed, then it would be hard to justify or understand why the latter should be given the death penalty. On the other hand, if you had no such similar prior case, then what are you suppose to compare it to in deciding whether or not the death penalty should be maintained.

The State of Louisiana would contend that although a district-wide comparison may be a proper point of origin in beginning to compare the proportionality of the sentence imposed in a particular case, that it is not the only Constitutional means of review. It is difficult to understand that there can be only one Constitutionally acceptable limit of proportionality and it is submitted that Constitionally there can be a number of considerations.

For instance, it is submitted that a Court in reviewing a death penalty in attempting to determine whether it meets the proportionality test, that this Court can consider not only cases arising within the district and/or parish involved, but can, consider cases which have been rendered in other districts and/or parishes within the same state. To do otherwise, it would appear, would put a premium on the particular moral or philosophical propensity of a particular district and thereby in fact subject a defendant to a greater penalty solely because of the area in which he committed a crime. In other words, if a particular district is by its nature quite conservative in law and order matters, and for some reasons seems to be quite willing to invoke death as a penalty for a crime, then they are setting up a proportionality standard which in affect will insure that all subsequent death penalties will be approved. However, on the other hand, if you have a district which because of its moral or philosophical standards is less inclined to impose such a penalty, then they are at the same time setting up a proportionality review which in essence would prevent the sustaining of a death penalty imposed in later cases. To that extent, you in fact fail to impose a uniform proportionality review on a state-wide basis because you are then justifying each individual district in setting up its own standards of when to impose a death penalty and when not to impose such a penalty. In that respect, although those defendants found guilty in parishes which have less of a propensity to impose a death penalty benefit therefrom, other defendants in other jurisdictions which have a higher propensity suffer from same. Therefore, it would be submitted that it is certainly proper

for a Court to not only consider a proportionality review based upon those decisions rendered in the district in question, but to look throughout the state in order to determine whether the death penalty under consideration is proportional to other similar cases from other jurisdictions.

Therefore, relative to the first issue raised by petitioner, the State of Louisiana would submit that it is certainly proper for the Court to consider a state-wide proportionality review standard and that the State Supreme Court doing so in this particular case is Constitutionally permissible and does not justify the granting of the Writ of Certiorari.

ARGUMENT ON ISSUE NO. 2

The next issue raised by petitioner is that although the jury voted unanimously in finding two statutory aggravating circumstances in this case, that the State Supreme Court erred in only reviewing in depth one of the two in order to sustain the death penalty imposed.

In the State of Louisiana, aggravating circumstances are defined in Code of Criminal Procedure Article 905.4 which article lists nine independent factors which can be considered as aggravating and justifying the imposition of the death penalty. The two circumstances pertinent to this case are;

(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery or simple robbery;

* * *

(g) The offense was committed in an especially henious, atrocious, or cruel manner; or

* * *

In this particular case, the jury stated that they had found unanimously the existance of two above listed aggravating circumstances. As a result thereof, they recommended the imposition of the death penalty which was in fact imposed by the presiding judge.

Upon appellate review, the State Supreme Court in essence avoided the issue of firmly deciding whether or not this particular crime was in fact committed in an especially henious, cruel or atrocious manner and to some degree indicated or implied that they did not find it to have been such. However, they further reviewed the facts and concluded that the jury was correct in finding the existance of the first aggravating circumstance, i.e. that the defendant was engaged at the time of the killing in the perpetration of an armed robbery.

A review of the facts of this case will clearly show that the jury was eminently correct reaching that decision inasmuch as items taken from the home of the deceased victim was found at the home of the defendant.

The question is whether or not the death penalty can be sustained despite the fact that the Court failed to properly review the existence of one of the aggravating circumstances or in reviewing same found it not to be applicable.

Under the statutory scheme present in Louisiana, and which is consistent to that of other jurisdictions, it is provided in Code of Criminal Article 905.3 that:

> "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exist and, after consideration of any mitigating circumstances, recommend that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances."

It is clear that under the statutory scheme present in Louisiana, that the jury need only find beyond a reasonable doubt one aggravating circumstance in order to support the imposition of the death penalty. Therefore, the Louisiana State Supreme Court is logically correct in concluding that if upon review of the record the evidence clearly shows that reasonable men could not have differed or reached a different conclusion and that beyond a reasonable doubt any one of numerous aggravating circumstances are supported by the evidence, then the death penalty should be sustained.

The petitioner ingenuousLy argues that we are not aware of which jurors may have voted for the imposition of the death penalty based primarily upon their finding of the aggravating circumstance which was not properly reviewed or which for some reason may have been invalid. However, without a further requirement that each juror state specifically which aggravating circumstances they rely upon in imposing the death penalty, such questions may never be answered in any case where more than one aggravating circumstance is found. Certainly, should this Court decide that that is what is required, then certainly such an inquiry would be Constitutionally mandated. However, although this Court is seeking to arrive at a just and equitable standard of review in order to make certain that the death penalty is only imposed based upon objective, valid and substantial considerations, it is submitted that such a requirement is undesirable.

It is submitted that the rights of the defendant are adequately safeguarded by the fact that the jury must unanimously vote to find the existence of an aggravating circumstance before they can impose the death penalty and further are directed by the Court that they must consider all mitigating circumstances which are submitted on behalf of the defendant. If the jurors are required to vote unanimously in order to find the existence of an aggravating circumstance, then certainly their finding of same implies that each individual juror felt beyond a reasonable doubt that that aggravating circumstance was present. It is further logical to assume that by their finding such an aggravating circumstance and further voting in favor of the death penalty implies that in their mind anyone of the aggravating circumstances voted for would have been sufficient to support their verdict. Certainly, if a juror felt that a particular aggravating circumstance either was not proved or was not sufficient to justify in his mind the imposition of the death penalty, then his first inclination would be to vote against the finding of that aggravating circumstance or to vote against the death penalty.

The petitioner argues that the Court should be required to review each and every individual aggravating circumstance relied upon by the jury and that by such a process would be able to justly determine the issues. However, that is not in fact the case. Even if the Court were to employ such a scope of review, it still would not answer the issue presented by him and that is which particular aggravating circumstance did each individual juror rely upon in arriving at the verdict of the death penalty. Therefore, it is submitted that in essence what the petitioner is asking is that this Court mandate that it is Constitutionally required that each individual juror indicate in some fashion which particular aggravating circumstance

he relies upon primarily or solely in deciding to impose the verdict of death. It is submitted that such is not Constitutionally required and that the defendant-petitioner is adequately safeguarded by the factors mentioned above and of which they are directed by the Court during the course of his instructing the jury as to their duties and functions.

For the above reasons, it is submitted that there is no legitimate issue to be presented to the Court and that for those reasons, the Writ of Certiorari filed on behalf of petitioner should be dismissed.

Respectfully submitted,

J. Nathan Stansbury

J. NATHAN STANSBURY
DISTRICT ATTORNEY